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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 8

UNITED STATES OF AMERICA,
Petitioner,

v.

BETHLEHEM STEEL CORPORATION, BETHLEHEM SHIPBUILDING CORPORATION, LTD., BETHLEHEM STEEL COMPANY, FORE RIVER SHIPBUILDING CORPORATION, UNION IRON WORKS COMPANY,
Respondents.

No. 9

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION,
Petitioner,

v.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.,
Respondent.

BRIEF FOR RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FREDERICK H. WOOD,
ALFRED MCCORMACK,
Attorneys for Respondents.

HOYT A. MOORE,
WM. W. ROBISON,
Of Counsel.

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UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, *Petitioner,* v. BETHLEHEM SHIPBUILDING CORPORATION, LTD., *Respondent.*	No. 9

BRIEF FOR RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 2323) is reported in 113 F. (2d) 301. Two opinions of the District Court (R. 733, 749) are reported in 23 F. Supp. 676 and 26 F. Supp. 259. Two further opinions of the District Court, not here material, are at R. 745 and 749.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on June 18, 1940. The petition for writs of certiorari was filed on August 22, 1940, and was granted on October 14, 1940. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936).

STATEMENT

The writ in No. 9 is for the review of a judgment affirming a judgment for the plaintiff entered December 23, 1938, in an action *in assumpsit*. The writ in No. 8 is for the review of a judgment affirming a decree entered December 12, 1938, dismissing the bill of complaint in a suit in equity.

Both causes arose out of contracts entered into in 1918 between the respondent, Bethlehem Shipbuilding Corporation, Ltd.* (hereinafter called Bethlehem), and the petitioner in the action at law, United States Shipping Board Merchant Fleet Corporation, under its former name of United States Shipping Board Emergency Fleet Corporation (hereinafter called the Fleet Corporation), for the construction of ships by the former for the latter.

The litigation was begun by an action at law by Bethlehem against the Fleet Corporation, which was pending in the District Court for the Southern District of New York when the bill of complaint in the equity suit was filed in the District Court for the Eastern District of Pennsylvania.

*Bethlehem Shipbuilding Corporation, Ltd., is the sole respondent in No. 9 and the real party in interest among the respondents in No. 8.

Pursuant to a stipulation entered into by the parties to both causes (R. 816-18), the action at law now before the Court was brought in the Eastern District of Pennsylvania upon the same causes of action, insofar as now material, as those pending in the action in the Southern District of New York, and the latter action remained passive, pending the joint trial of the two causes in the District Court for the Eastern District of Pennsylvania.

1. The issues as presented by the pleadings.

In view of the petitioners' comments upon the failure of Bethlehem to prove this and that, or of the Master to find this and that, the questions before the Court may be clarified by a statement of the issues as presented by the pleadings.

In its action at law Bethlehem sued to recover, among other claims, sums remaining unpaid to it pursuant to the provisions of certain of the above-mentioned contracts. In its affidavit of defense in that action, the Fleet Corporation sought to prevent the recovery of such additional sums, and to recover amounts that had been paid to Bethlehem, upon the ground that some of the contracts had been induced by false representations made by Bethlehem as to the estimated costs of the ships to be constructed, and relied upon by the Fleet Corporation (R. 391-8). In the Bill of Complaint in its suit in equity, the Government sought, among other claims, to recover such amounts theretofore paid upon the same ground (R. 1958-60). As said by the Circuit Court of Appeals (R. 2326-7):

> "In the pleadings and in the court below the chief contention of the Government was that Bethlehem was guilty of fraud in the making of the ship construction contracts to which we have referred."

The charges of fraud made by the pleadings were specific, and were two in number.

First, it was charged that Bethlehem had falsely represented that, by reason of circumstances existing at the time when the contracts were made, it was "impracticable to estimate within a reasonable percentage what would be the actual cost of constructing" the vessels covered by the contracts.

The second charge was that Bethlehem had falsely represented that the estimates submitted were "fair and reasonable estimates of said costs, based upon the wage scale then in effect and upon existing costs of materials, together with a reasonable allowance to cover increases in cost in the ensuing eighteen months" (Affidavit of Defense, Par. Nineteenth, R. 396). The amounts of estimated cost stated in the contracts were alleged to have been known by Bethlehem's representatives "to be very greatly in excess of any costs which could reasonably be anticipated" (Affidavit of Defense, Par. Twentieth, R. 396-7). Upon both of these issues of fact the Master and both courts below found in favor of the respondent.

The findings below are unanimously to the effect that there was no fraud in the transactions. Hence, the petitioners now abandon the fraud charge and contend that, because it was at that time impossible to estimate cost of construction "within a reasonable percentage", and because the estimates submitted did contain "a reasonable allowance to cover increases in cost in the ensuing eighteen months", and were "costs which could reasonably be anticipated", Bethlehem is not entitled to recover any additional sums under the contract, and must pay back a part of those already received. In other words, the petitioners by their

pleadings, upon which the cases were tried before the Master, asserted that Bethlehem could not recover the amounts claimed to be due under the contracts, and should be required to pay back a portion of those already received thereunder, because the representations upon which the contracts were entered into were false, while they now contend that the petitioners are entitled to the same relief because such representations were true.

The primary bases of the contention now made are (1) that Bethlehem is not entitled to recover under the so-called half-savings clause, in the absence of proof that such savings were the result of increased efficiency, and (2) that the estimates of probable cost, because they contained allowances for probable increases in the cost of materials, for an anticipated decrease in the efficiency of labor, and for certain other contingencies, were not a proper basis for determining the amount to be paid to Bethlehem under the half-savings clause, because there was a possibility that some of such contingencies would not occur and that, therefore, Bethlehem would benefit by savings not entirely attributable to its efforts.

No such issue as the first of these contentions was tendered either in the Government's bill in equity or in the Fleet Corporation's affidavit of defense. Neither the Government in its bill, nor the Fleet Corporation in its counterclaim, alleged that it was entitled to recover amounts already paid, under the half-savings clause, upon the ground that the difference between actual and estimated cost did not result from increased efficiency; nor did either plead that there was a failure of consideration, or that the contract was unconscionable or against public policy, by reason of that alleged fact.

The second of the contentions mentioned is not only not within the issue tendered by the pleadings, but is directly contrary to the pleadings, which interpreted the contracts as calling for estimated base costs which included allowances for increased cost of materials, anticipated decrease in the efficiency of labor, etc., and only complained that the estimates upon which the base costs were predicated were swollen and inflated.

Neither did the Government in its Bill of Complaint, nor the Fleet Corporation in its affidavit of defense, allege, as is now contended, that the contracts in question were exacted under duress, or that the officers of the Fleet Corporation lacked authority to enter into such contracts except under conditions which would limit the profits arising under the half-savings clause to those proven to have resulted from increased efficiency.

Except for the charges of fraud, now abandoned, and charges relating to an alleged dual capacity of Charles M. Schwab*, which were abandoned during the trial, the only

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*These allegations of the bill of complaint (Pars. Twenty-sixth-Twenty-eighth, R. 1961-4) and the affidavit of defense (Pars. Twenty-sixth-Twenty-ninth, R. 399-402) were to the effect that Charles M. Schwab after April 11, 1918, held the office of Director General of the Fleet Corporation while also holding the office of Chairman of the Board of Directors of Bethlehem Steel Corporation and a dominating position in its subsidiary companies, and that the Fleet Corporation during such alleged dual relationship of Charles M. Schwab, failed to exercise a power to modify, suspend or cancel the contracts in controversy. This element of the cause of action in the equity case and of the defense and counterclaim in the action at law was not pressed either in brief or argument before the Master, was completely disposed of by the Master in his report (R. 542-3), was not urged either in brief or argument before the District Court or the Cir-

ground of relief asserted in the bill in equity or the affidavit of defense was to the effect that no contractor in time of war is entitled to receive more than "a fair and reasonable profit upon the work done", and that any contract which results in "the payment of any sum in excess of a fair and reasonable profit * * * is void and unenforceable" (R. 1960; 398-9). This broad contention also appears to have been abandoned, though it was suggested in the petition for certiorari.

In short, not a single one of the grounds upon which the petitioners now seek relief was within the issues as tendered by the pleadings. The point is not a technical one, since the case was tried, the record was made, and the Master's findings and conclusions were predicated, upon the issues so tendered.

2. The facts as found.

(a) *As to advantageous character of the form of contract adopted.*

The history of the negotiations which led up to the first series of contracts in suit, upon which agreement was reached on January 5, 1918 (R. 530-1), is set forth in our Point IV. In the negotiations Bethlehem was represented by Joseph W. Powell, its Vice-President, and Harry Brown, its Technical Manager, both competent shipbuilders. The Fleet Corporation was represented, as the Master found (R. 527), by "two equally competent shipbuilding experts",

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cuit Court of Appeals, and was not mentioned in the statement of either appellant of the points upon which it intended to rely on its appeal to the Circuit Court of Appeals upon which the record was made up pursuant to Rule 75 (g) of the Federal Rules of Civil Procedure (R. 770, 2313).

Admiral F. T. Bowles, Manager of its Division of Steel Ship Construction, and G. S. Radford, Manager of its Contract Division, who "were advised by, and had full opportunity to advise with, Daniel H. Cox, a competent naval engineer and estimator". The interests of the Fleet Corporation were also protected by Charles Piez, its Vice-President and General Manager, who, as the Master found, "while not a shipbuilder by experience, was a nationally known business executive of long experience" (R. 527).*

Three forms of contract were open to the parties —lump sum, cost plus, and the form adopted, by which the contractor was to be paid the actual cost of the ship, a fixed fee, and a percentage of the amount, if any, by which actual cost was less than the estimated or base cost inserted in the contract (R. 2324).

In his letter of December 13, 1917, in response to a request to submit a program for the construction of vessels, Powell wrote to the Fleet Corporation, submitting several alternative programs (Exh. G-104, R. 1806, offered, R. 875). In that letter he said:

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*Admiral Bowles was regarded as one of the foremost shipbuilders in the country. He had been Chief Constructor of the United States Navy and was credited with being the builder of the White Squadron of Spanish-American War days. Later for some ten years he had been President of Fore River Shipbuilding Company (R. 837-8, 1505, F. 19, R. 686). His first assistant, Daniel H. Cox, was a well known marine architect and engineer of experience in shipbuilding (F. 19, R. 686; R. 1505). G. S. Radford was a graduate of Annapolis and also of the Massachusetts Institute of Technology, and had served for ten years as a constructor in the Navy and had had charge of contract matters (R. 1600). Charles Piez for some fifteen years before he became Vice-President and General Manager of the Fleet Corporation had been President of the Link Belt Company of Chicago (R. 1494).

> "Because of the unprecedented conditions surrounding the Labor and Material market, it is impracticable to estimate within a reasonable percentage what will be the actual cost of construction, and it is therefore impossible to submit fixed prices for any of these vessels, except upon a basis so far above estimated cost that any figure acceptable to this Company would not be acceptable to the Emergency Fleet Corporation. * * *"

The Master and both courts below found that it was not only impracticable, but impossible, under the circumstances then existing, to make an accurate estimate of what it was going to cost to build a ship (F. 3, R. 681; R. 760, 2333). This finding is based upon a unanimity of testimony of witnesses for both sides—of Powell and Brown, who represented Bethlehem in the negotiations, and also of Piez (R. 1496-8), the General Manager of the Fleet Corporation, and of Radford, who, together with Bowles, represented the Fleet Corporation in the negotiations and who was the petitioners' chief witness in respect of those negotiations (R. 1611-3).*

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*At the time when these suits were brought to trial Bowles was dead (F. 18, R. 577). Radford and Piez were the only persons who had been connected with the Fleet Corporation, and who had had anything to do with the letting of the contracts, except insofar as they were advised by Cox and by Cuthell, who was counsel for the Fleet Corporation (R. 527). Piez, as well as Radford, corroborated the truth of the representation contained in Powell's letter of December 13, 1917 (R. 1496-8, 1611-13). Neither Cox nor Cuthell was called as a witness. In view of these circumstances, the allegation in the Government's Bill, repeated a year later in the affidavit of defense of the Fleet Corporation, that the representation contained in Powell's letter was knowingly false at the time when it was made, exhibits a considerable degree of recklessness upon the part of the Government and the Fleet Corporation.

That the form of contract adopted was more favorable to the Fleet Corporation and the Government than a lump sum contract would have been was expressly found by both the District Court (R. 736) and the Circuit Court of Appeals (R. 2330). Both courts, as well as the Master, also found that the form of contract adopted was more advantageous to the Fleet Corporation and the Government than a straight cost-plus contract, without the half-savings clause, would have been (F. 3, R. 684, 760, 2330).

These findings were required by the uncontradicted evidence of witnesses for both sides.*

(b) *As to the propriety of the estimated costs which were the basis of the base costs specified in the contracts.*

The petitioners complain that the estimates prepared by Brown, and which subsequently became the base prices specified in the contracts, contained allowances for possible increases in the cost of material and transportation, for anticipated decrease in the efficiency of labor, for contingencies, etc. (Br., p. 7**).

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*In view of the foregoing facts, it would be immaterial, even if it were a fact (which it is not), that Bethlehem insisted upon the use of the "half-savings" form of contract and refused to accept the work on any other basis (See pp. 58-67, *infra*).

**The statement on page 7 of the petitioners' brief that, in preparing his estimates, Brown assumed that wage rates would increase by 29 percent, that there would be a 30 percent decrease in efficiency of labor and that a flat 10 percent of the total cost should be added to cover contingencies is patently inaccurate. 29 percent for increase in wage rates was Brown's estimate of the increase that had already taken place at the date of his estimates, as compared with the wage rates paid on Hull 253 which had been completed in June, 1917, and on the cost of which his estimates were chiefly based (R. 1534); the 30 percent allowance for decrease in

In his letter of December 13, 1917, to which reference has already been made, Powell said (F. 11, R. 683-4, Exh. G-104, R. 1806, offered, R. 875):

> "It is proposed, however, that they [the ships to be built] be constructed on the basis of actual cost plus a fee, with an agreed upon *probable cost,* this Company to be paid in addition to the fee one-half of any saving that may be made below this cost figure, and with the further provision that the estimated cost figure will be increased due to any increase in rates of wages that may be approved by the Emergency Fleet Corporation."

"Probable cost", by definition, necessarily includes allowances for probable increases in the cost of materials and of transportation, for probable decreased efficiency, and for contingencies.

In the same letter the basis (and the purpose as well) of the fees and estimated costs to be inserted in the contracts was thus described:

> "The basis of fees and estimated cost to be such as to offer a reasonable probability of a net earning after paying all War and Excess Profit taxes as

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efficiency of labor included loss of efficiency which had occurred since the period of construction of Hull 253, as well as anticipated further loss in efficiency (Exh. G-154, R. 1852, offered, R. 920; Exh. B-33, R. 1931, offered, R. 1537; R. 604-5), and about half of the 10 percent allowance for contingencies represented the estimated cost of navigating and hotel equipment and war zone requirements, which had not entered into the cost of Hull 253 (Exh. G-155, R. 1857, offered, R. 921; R. 857, 930-1, 1054-6). Moreover, the statement on page 7 of the petitioners' brief that "The allowance for a rise in material price was admittedly excessive" is without support in the evidence, as is established by the very record references cited in petitioners' brief in its support.

> today existing, of Ten Percent (10%) of the present estimated cost of construction." (F. 11, R. 684, Exh. G-104, R. 1808.)

In his letter of December 19, 1917 (Exh. G-109, R. 1821, offered, R. 882), in which estimated base costs were submitted, Powell was even more specific as to their composition, saying (R. 1825):

> "As stated in this Company's letter of the 13th instant, it is impracticable to estimate within a reasonable percentage what will be the actual cost of construction but, based upon a close study of the facts affecting cost, and the knowledge of increase therein in the last two years, *and making allowances as seem reasonable to cover the next eighteen (18) months the period of construction of these vessels*—the estimates for the 10,000-ton tank vessels and the 7,400-ton cargo vessels are, as follows. * * *"

The estimates submitted in this letter were based upon estimates theretofore prepared by Brown, to which Powell had added approximately 5% (F. 17, R. 686).

In the negotiations which took place in January, 1918, "the contracts were closed substantially on the basis of Brown's estimates" (F. 18, R. 686). The Master found that the method used by Brown to arrive at his estimates "was a reasonable one"; that the estimates "were as accurate as could be expected under the uncertain conditions prevailing at the time"; that they were fairly and honestly made; that they "represented reasonable estimates of probable cost"; that there was no "misrepresentation or fraud" on the part of Bethlehem in the negotiation of the contracts (F. 8, 9, 23, 24 and 26, R. 683, 688-9); and that the base prices were agreed upon by a process of barter

and trade in "dealings * * * at arm's length" (F. 20, R. 686) conducted on behalf of the Fleet Corporation by shipbuilders as experienced and competent as those representing Bethlehem (R. 527; F. 19, R. 686).*

The Master also found that, in order "to keep down the cost" and thus carry out the purpose of the contract, it was "essential that the estimated or base cost should be sufficiently liberal to afford a reasonable opportunity to the contractor to cut under it", and that it was so intended and understood by the Fleet Corporation (F. 12-4, R. 684-5).

The above-mentioned findings were not challenged either in brief or argument before the District Court, or before the Circuit Court of Appeals. They are not now challenged by the petitioners, nor are they susceptible of

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*The Master found that the representatives of the Fleet Corporation checked the estimated costs submitted by Bethlehem, with prices being quoted by other shipbuilders (F. 22, R. 688; also R. 534), and had other means of checking them (R. 538; Rulings on Government's Requests No. 121, R. 619; No. 125, R. 620; No. 139, R. 624). Quite aside from this, however, it is perfectly obvious that had the representatives of the Fleet Corporation requested the submission of the bases of the estimates, and of the basic data upon which they were predicated, they could have checked them within a few minutes, and, through the use of such basic data and the application thereto of such factors of increase as the representatives of the Fleet Corporation might have thought to be appropriate, provided themselves with counter-estimates.

The suggestion which has been constantly repeated throughout this case that the Fleet Corporation and its representatives were helpless when it came to the determination of base prices, and that Bethlehem's representatives had greater ability to determine the probable cost of the vessels to be constructed, is and always has been completely mythical (see pp. 62-68, *infra*).

challenge in view of the evidence of all of the parties, including witnesses called by the Fleet Corporation. It thus appears that it was understood and intended (1) that base cost should contain allowances for those probable increases in cost now complained of by the petitioners, and (2) that it was not to represent "a close estimate of the bare cost of construction," but was to be sufficiently liberal to offer an incentive to the contractor to keep the cost down, to the mutual advantage of the Fleet Corporation and the contractor.

(c) *As to the manner in which the half-savings clause was intended to operate, and the results accomplished thereunder.*

The contracts provided in very simple terms that the contractor should receive one-half of the amount, if any, by which actual cost should be lower than estimated cost, after adjustment for wage increases, and changes and extras. They did not provide that the resulting difference should be thus divided between the Fleet Corporation and the contractor only to the extent that it might be proved to have resulted from increased efficiency in the handling of labor or material, or in the management of the business; nor did they set up any standard of "efficiency", or provide any formula by which an "increase" in efficiency might be measured. In view of Bethlehem's statements as to the composition and purpose of the base costs submitted, and of recognition upon the part of representatives of the Fleet Corporation that the estimates must be sufficiently liberal to afford a reasonable opportunity to "cut under them", the omission could not have been inadvertent.

The Master found that it was intended that Bethlehem should "participate in savings however earned", although it expected to produce savings by increased efficiency (F. 173, R. 637).

In their Statement, and in the argument which follows in their brief, the petitioners say that that finding is inconsistent with other findings made. For reasons hereinafter stated, it clearly is not. But whether inconsistent with other findings or not, it is the only finding consistent with the terms of the contract, the purpose of the parties, and their mutual understanding as to the composition of the base costs inserted in the contract.

For the Fleet Corporation was well aware of what it was doing when it signed the half-savings contracts. Before they were signed, Piez consulted with the Navy Department's representatives, Admiral Taylor and Mr. Franklin D. Roosevelt, then Assistant Secretary of the Navy; and Piez preferred to have the same kind of a contract as the Navy Department had (R. 1501).

Like the Navy Department, the Fleet Corporation entered into the half-savings contract with a very simple idea in mind, *viz.*, that that form of contract offered, on the one hand, an escape from the difficulties of agreeing upon a firm price at any reasonable figure, and that it furnished, on the other hand, a safeguard against the tendency to waste involved in straight cost-plus contracts, in that it gave the contractor a strong incentive to economize, for the mutual benefit of both parties. This simple "device", as Piez called it, worked out so well with the Bethlehem contracts that, as the Master found, the ships constructed by Bethlehem cost the Government less than did similar ships built by other companies, including old line shipbuilders,

either under lump sum or cost plus contracts (R. 554, 568). The Master found (R. 568):

> "The testimony in the record justifies the conclusion that with or without adjustment to reflect the difference in specifications, the cost to the Government of the vessels built under the Bethlehem contracts was less, for the value received, than the cost under contracts with other shipbuilders".

(d) *As to the contracts involved in the case.*

Between about February 1, 1918, and a date subsequent to July 15, 1918, as of which date the last of them was dated (R. 295), Bethlehem entered into 18 separate contracts with the Fleet Corporation, under which it constructed 83 ships of various sizes and types. 8 of such contracts, covering the construction of 51 ships, were dated December 31, 1917, and were executed February 1, 1918 (R. 552, 589). 7 of such 8 contracts are among the 13 which the petitioners attack before this Court.

The remaining 10 of such 18 contracts were entered into after February 1, 1918. 8 of such 10 contracts covered the construction of ships of types and sizes similar to some of the ships covered by the earlier contracts; and of such 8 later contracts, 6 are among the 13 now under attack by the petitioner.

The amount of the judgment recovered by Bethlehem in the action at law is $5,272,075.10. Of that amount, the following amounts were conceded, by stipulation of the parties (Exhs. A, B, D, R. 1642, 1713, 1721, offered, R. 819, 820), to be due to Bethlehem on account of contracts other than the 13 now under attack:

For completed ships:		
Under Contract 182 S. C.		$ 178,989.03
Under Contract 465 S. C.		935,306.22
For canceled ships and contracts:		
Under Contract 465 S. C.	$286,462.49	
Under Contract 313 S. C.	84,044.29	
Under Contract 340 S. C.	286,173.58	
	$656,680.36	
Less overpayments on canceled Contract 312 S. C. and on ships canceled from Contract 301 S. C.	147,473.50	509,206.86
		$1,623,502.11
Bethlehem's recovery also includes (Report, R. 563) the following additional amounts claimed in its Nineteenth and Twentieth causes of action (R. 104-7) and admitted to be due to it (Exh. D, par. 5, R. 1722; R. 1631-2):		
For Curtis marine propelling equipments (also referred to as Perley Morse deduction)		$ 90,019.25
For reconditioning property at Wilmington		2,570.00
Undisputed amount due to Bethlehem		$1,716,091.36
Deduct miscellaneous off-sets concededly due to the Fleet Corporation, not directly concerned with any of the above-mentioned contracts (R. 563)		201,096.43*
Undisputed amount included in Bethlehem's recovery of $5,272,075.10		$1,514,994.93

*Through an oversight, we neglected to deduct this amount in setting forth the above schedule in our brief in opposition to the petition for certiorari.

Thus, of the amount of the judgment, only $3,757,080.17 represents amounts found to be due under the 13 contracts now before the Court. That amount breaks down as follows:

Due under 7 contracts dated December 31, 1917	$1,185,342.84
Due under 6 later contracts	2,571,737.33
	$3,757,080.17

The contentions that the contracts were unconscionable, that the circumstances of their negotiation made them invalid, and that they were enacted under duress, obviously do not apply to any of the contracts in respect of which the terms were fixed by the Fleet Corporation itself, after an actual study of the factors involved in fixing a base cost for the purposes of the half-savings clause. Such clearly was the situation in respect of the six later contracts, as to each of which the Master found (R. 554):

> "The evidence shows, and the Master finds, that as to the later contracts the representatives of the Fleet Corporation had opportunity, which they took advantage of, to determine whether the 'base cost' of Bethlehem would produce a higher net cost to the Government than those contracts of other shipbuilders, and that as a result of deliberate judgment they [the representatives of the Fleet Corporation] fixed the 'base cost' of all of these contracts at what was believed to be as fair and reasonable as could be estimated under all of the existing circumstances".

Thus, except in so far as the petitioners contend that the half-savings clause was invalid *per se*, or that recovery under it may not be had in the absence of proof of savings obtained by some special efforts to increase efficiency, the petitioners' attack is directed only at the seven contracts dated December 31, 1917, on which Bethlehem has recovered a total of $1,185,342.84.

On the other hand, the petitioners are seeking, not only to prevent recovery of the $3,757,080.17 found to be due under the 13 contracts, but, both by counterclaim in the law action and by the bill in equity, to recover some $8,000,000 which the Fleet Corporation paid pursuant to the half-savings provisions of those contracts, more than half of which was paid under the above-mentioned six later contracts. When the petitioners say in their brief that "Bethlehem can recover none of the additional $12,000,000 profits which it claims under the bonus-for-savings provisions of the contracts" (p. 15), what they mean is that Bethlehem must be denied recovery of some $3,750,000 of the sum which the judgment awards it, and that it must make good to the Government for an additional $8,000,000 of payments already received, plus whatever interest the Government would be entitled to receive.

The events which the case involves occurred 23 years ago. The case has been in litigation for more than 15 years. It was tried twice, before two Special Masters. Four years elapsed between the issuance of the Second Master's proposed report, which found in Bethlehem's favor exactly as did his final report, and the date when, having withheld the report so that the petitioners might submit a new set of findings, his final Report was issued. More than six years

have elapsed since the issuance of the final Master's Report.

The judgment in favor of Bethlehem was awarded after twenty years without interest, and is in the amount of $3,272,075.10. If discounted on a 4% basis for twenty years, the value of the judgment is approximately $2,406,000. The amount admittedly due to Bethlehem ($1,514,994.93) aggregates, with 20 years' interest at the same rate, approximately $2,727,000. Thus it will be seen that, if our basis for interest and discount is even approximately correct, the collection of the judgment in 1941 would yield Bethlehem a recovery of less value than the amount that is admittedly due to it under the contracts.

SUMMARY OF ARGUMENT

I

The contention that the contracts permit payments under the half-savings clause only upon a showing that Bethlehem, by special efforts, increased its efficiency, is opposed to the plain and unambiguous terms of the contracts themselves, to the intention of the parties, and to the findings of the Master and of the courts below.

II

The contention that Bethlehem made no efforts to increase efficiency, and that savings did not result from such efforts, is not supported by either the findings or the evidence, and is contrary to both the findings and the evidence.

III

The authorities cited by the petitioners do not support the proposition that the "half-savings" provision of the contracts was without consideration.

The half-savings clause is not severable from the other provisions of the contracts in respect of payment to be made to the contractor and is not dependent for its validity upon an independent consideration.

The contracts were not unconscionable.

IV

The contentions of the petitioners that the contracts were made under circumstances amounting to duress and are unconscionable, either because of the circumstances under which they were negotiated or for any other reason, are without support either in fact or in law.

V

Petitioners' arguments amount to a contention that all bonus-for-savings contracts are invalid, and beyond the power of the Government to make. The contention is without basis in law.

VI

The petitioners are asking this Court to exercise a function of Congress in respect of the regulation of profits,

ARGUMENT

I

The contention that the contracts permit payments under the half-savings clause only upon a showing that Bethlehem, by special efforts, increased its efficiency, is opposed to the plain and unambiguous terms of the contracts themselves, to the intention of the parties, and to the findings of the Master and of the courts below.

The contracts are clear and unambiguous, and admit of but a single interpretation, and that directly contrary to the contention of the petitioners.*

In express terms they provide that Bethlehem shall be paid one-half of the difference, if any, between actual and estimated costs, from whatever cause occurring. The contention that it shall be paid only such part of the difference as may be demonstrated to be the result of "increased efficiency" is thus contradicted by the contracts themselves.

The petitioners say that the contracts must be "interpreted as a whole", and point to other provisions which they contain. But they fail to point to any provision which is inconsistent with the plain language of the clause in question, or which gives rise to any ambiguity in its terms.

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*The governing contract provision upon the interpretation of which this point turns is set out at page 32 of the petitioners' brief, and is as follows:

> "Should the actual cost be less than the estimated * * * cost * * *, the Contractor shall be allowed as profit on each vessel in addition to said fixed sum for profit of * * * $210,000 one-half the amount by which such actual cost of each vessel falls short of the estimated cost * * *." (Article XIX, R. 117.)

The petitioners seek to have the contracts construed as if the provisions for payment to Bethlehem in addition to the fixed fee were (1) that Bethlehem should share in any amount by which actual cost should be less than the estimated cost provided in the contract, (2) but only if such saving in cost should result from increased efficiency in the construction of the ships and (3) the burden should be on Bethlehem to prove that the saving had so resulted. The contracts did not so provide. If they had Bethlehem would have been undertaking to engage inevitably in a lawsuit on each contract under which it might claim additional compensation by reason of savings accomplished. This would have been true because it would have been impossible to specify in the contracts any formula by which the extent to which savings had resulted from increased efficiency could be measured.

The petitioners in their brief talk about existing efficiency at the time of entering into the contracts, as if they conceived that to be a fixed and determinable quantity from which to begin to measure efficiency accomplished in the performance of the contracts. No such starting point was capable of determination either at the time of making the contracts or thereafter. No formula has ever been, or can be, devised by which to determine the degree of efficiency of a shipbuilding plant at any given point of time.

Had the contracts been intended to limit Bethlehem's sharing in savings accomplished to such as should be accomplished by demonstrated increase in efficiency, it would also have been necessary to specify of what increased efficiency should consist; whether it should be confined, as the Government claims, to an increase of the efficiency of labor as compared with the date of the contract, or should include

a reward for overcoming any decreased efficiency of labor due to the large expansion of forces and the hiring of huge numbers of green and unskilled men (R. 1346-48), efficiency in the purchase and handling of materials, including the prevention of waste and of increased cost of materials resulting therefrom, efficiency in general management and supervision or what not. Relative degrees of efficiency in each of these fields in the construction of 88 ships in five yards over a period of eighteen months or more could have resulted only in lawsuits in the absence of some formula set up in advance for their ascertainment which, as we have said, it would have been impossible to devise. Instead of attempting to do so the parties to the contracts provided therein the simple mathematical formula whereby the application of the "half-savings" clause was made dependent upon the relation between actual cost and estimated cost, a fact readily ascertainable. Both parties so understood the contract provisions and the Master so found (R. 637).

The petitioners say (Br., p. 39) that it would have been simple to provide a formula by which the effect of increased efficiency upon cost could have been determined with that nicety required by their interpretation of the contracts in order to insure justice to both parties. If that be so, then the omission of such a formula is all the more significant, and emphasizes the contention that the contracts are to be interpreted as written.

It is, of course, elementary law that, since the contracts are clear and unambiguous, all prior negotiations were merged therein, and their terms may not be varied by parol evidence. Were the rule otherwise, it would not help the contention of the petitioners, because what occurred during the negotiations only emphasizes that the parties in-

tended the so-called "half-savings" clause to apply as it was written.

First, as we have pointed out, Bethlehem's proposal of December 13, 1917 (F. 11, R. 684, Exh. G-104, R. 1807-8, offered, R. 875), was that the base prices should represent "an agreed upon probable cost", which, of course, would include allowances for probable changes in cost and for contingencies.

In the same letter of December 13, 1917, as we have pointed out, Powell informed the Fleet Corporation that the bases "of fees and estimated cost" were to be "such as to offer a reasonable probability of a net earning after paying all War and Excess Profit taxes as today existing, of Ten Percent. (10%) of the present estimated cost of construction." (*Ibid.*) The fixed fee proposed was approximately 10% of the estimated or base cost submitted. The Fleet Corporation was thus advised that the estimated costs submitted were not only to be estimates of probable cost—as such expression would be commonly understood—but were to be sufficiently liberal, if Bethlehem's job should be well done, to absorb all war and excess profits taxes and leave the fixed fee as net earnings (R. 553-4).

Third, Powell's letter of December 19 made it entirely clear that the proposed base prices or estimated cost of the several types of ships included allowances for probable increases of cost during the period of construction (Exh. G-109, R. 1825, offered, R. 882).

The representatives of the Fleet Corporation took no exception, nor did any witness who testified in the case take exception, to the use of "probable cost" as the base prices, or to Bethlehem's suggestion that the base price be such as to offer a reasonable probability, if the contractor's

job should be well done, of a 10% net earning after war and excess profits taxes, or to the inclusion in probable costs of reasonable allowances for probable increases and for contingencies. On the contrary, as the Master found, the representatives of the Fleet Corporation checked the estimated costs with prices being quoted by other shipbuilders (footnote p. 13, *supra*).

The petitioners' witness Sanford, who was put on the stand to attack Brown's estimates of cost, testified that he himself would have used the same method of estimating (R. 1316), and differed with Brown only as to some of the factors which he used in his estimates.

Moreover, the use of fairly liberal estimates of cost was not only acceptable to the Fleet Corporation, but became an enunciated policy of the Fleet Corporation, as witness the report of Piez, the General Manager of the Fleet Corporation, to its board of directors, under date of October 9, 1918, in which it was said (R. 552; Exhibit B-6, R. 1901, offered, R. 1503, 1530):

> "In fixing these estimated basis costs, care must be exercised that they be not placed at too low a figure, for if they are, the probabilities are that the contractor will lose interest in keeping the cost down as soon as it finds that the ship will cost more than the estimated basis cost.
>
> "We discussed this matter with the Board at the time the commitments were made last Spring, and showed how we intended to fix the basis cost. At the suggestion of the Board, our method of fixing the basis cost was not kept on the record, the Board fearing that such a record might be an embarrassing precedent."

Thus, it was the settled policy of the Fleet Corporation, when using half-savings forms of contracts, which were not peculiar to Bethlehem (R. 1502), to make the estimated costs sufficiently liberal so as to make reasonably sure that the contractor would have the necessary incentive to keep the costs down (R. 551-2, Exh. B-6, R. 1900, 1901, offered, R. 1503, 1530; F. 13, R. 685).

Piez, who believed in bonus-for-savings contracts, and had had experience with them in his own business, testified as to the technique of fixing base prices (R. 1500-1):

> "The price had to be placed for actual cost, if we knew the cost, plus an allowance for contingencies, plus an allowance for incentive, plus the fee. So we start out with bare cost; then in order to meet any contingencies that may happen, add some allowance for contingencies; in order to give a proper incentive, add an incentive allowance; and then add the fee."

If the plain words of the contracts did not make sufficiently clear what the parties had in mind when they adopted the half-savings clause, their intentions would be made entirely obvious by Bethlehem's written proposals, by the evidence as to the Fleet Corporation's policy, and by the testimony of Piez, the responsible and active official of the Fleet Corporation who was authorized to make contracts on its behalf.

Piez reported to the Board of Trustees of the Fleet Corporation (R. 1901):

> "The best device that we have found for that purpose [*i.e.*, as stated in the preceding sentence, to provide some incentive on the contractor's part to holding the cost down] is to fix an estimated basis

> cost satisfactory to ourselves and give the contractor a share in savings, if the actual cost be less than the estimated basis cost."

The Master found, and both courts below sustained his finding, that Bethlehem was to share in the savings, however earned, but expected that it would produce such savings by increased efficiency (F. 173, R. 637).

Before the Master, the petitioners' contention that the contracts (or the first series of them, dated December 31, 1917) were induced by fraud was based in part upon the argument (1) that the parties intended to fix base prices which would not permit Bethlehem to effect savings except by an increase in efficiency, (2) that the prices were not so fixed, and (3) that the reason why they were not so fixed was that Bethlehem presented, and the Fleet Corporation accepted and relied on, cost estimates that were intentionally swollen and inflated. These arguments were presented to the Master in a long series of Requests to Find (Nos. 154-5, 159-62, 166-73, R. 631-7), and the Master denied each and every one of them. The last of such requests was as follows:

> "173. At the time of the negotiations relating to the respective tank and cargo ships in controversy, it was understood that under the 'half-savings' form of contract Bethlehem was supposed to participate only in such 'savings', if any, as were earned and made possible by its efforts and ability to reduce cost by increasing efficiency."

Upon this request the Master ruled as follows:

> *"Denied. Bethlehem was to participate in savings however earned, but expected to produce savings by increased efficiency"* (R. 637).

The petitioners repeatedly urge in their brief (specifically at pp. 7 and 16, and impliedly at pp. 36 and 44) that that finding must be taken at less than its face value because, they say, it is inconsistent with the Master's affirmance of the petitioners' Request No. 174 (R. 638), in affirming which the Master said:

"Affirmed, but see also 170, 171 and 173."

The Master thus clearly showed that in affirming Request No. 174 he had no intention of qualifying, or modifying in any way, his finding in response to Request No. 173, quoted above, that Bethlehem was to participate in savings however earned.*

It will be noted that none of the petitioners' Requests for Findings, above cited, suggests that the parties intended to write the contract so that by its terms Bethlehem would share in savings only to the extent that they might

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*Moreover, petitioners, in each of the references in their brief to Finding No. 174, distort its meaning by omitting the words indicated by brackets in the following quotation of the finding:

> "174. At the time of the negotiations relating to the respective tank and cargo ships in controversy, it was understood that participation in 'savings' was supposed to represent [a bonus or additional compensation to be earned by Bethlehem as] consideration for its special efforts and ability to reduce cost by increasing efficiency of management and labor as compared with efficiency then existing."

Even without a reading of the finding in its context, among the Requests which preceded and followed it, and even without the Master's cross-reference to the preceding findings, it would be clear enough that the Master did not intend the word "consideration" to be read as the petitioners are attempting to read it.

be the result of an increase in efficiency above some basic standard. On the contrary, all such Requests for Findings assumed, in accordance with the theory of the Bill of Complaint and the Affidavit of Defense, that the contracts were written just as the parties intended and that, being so written, they must be set aside because they permitted Bethlehem to share in savings realized on base costs which were fraudulently inflated.

The present contention is an attempt to escape the unanimous findings below that the charges of fraud were without basis in the evidence, and to attain the petitioners' objective by asking this Court to re-write the contracts to conform to what petitioners now say that the parties ought to have intended, though the Master and both courts below have found that *they did not so intend*.

Of course, no one has ever disputed the fact that the half-savings clause was intended as a stimulus to the contractor to increase efficiency; that is its obvious purpose. But that is a very different thing from saying that the parties did not intend their contract to operate according to its terms, unless the beneficial effect of the half-savings clause was demonstrated, not only by the results achieved, but by a judicial appraisal of the extent to which the achievement was due to "special efforts" of the contractor to attain a standard of efficiency better than some contemporary standard which the parties might be supposed to have had in mind, but which they neither stated in the contract, nor mentioned in their negotiations.

In respect of the contention now made, the Circuit Court of Appeals said (R. 2329):

> "Its argument is based upon the premise that the bonus for savings was limited in its application to

savings resulting from increased efficiency. We think that the premise is without foundation in the record and the argument consequently falls. There is nothing in the contracts themselves to indicate that savings resulting from increased efficiency alone was (*sic*) intended to be compensated for. The evidence fully supports the master's finding that 'Bethlehem was to participate in savings however earned, but expected to produce savings by increased efficiency.' It must be concluded that the contracts were entire and that the bonus for savings formed part of the consideration for Bethlehem's obligation to build the ships."

Finally the asserted interpretation would defeat the purpose of the contract. The Government concedes that Bethlehem would be entitled to one-half of any reduction under estimated cost due to increased efficiency (Br. p. 22). Material and other costs increased as anticipated.* The contracts contained protection against wage increases and the cost of changes and extras, but not against increase in material costs, decrease in the efficiency of labor, or contingencies, all recognized elements of probable cost. Under the form of contract adopted, and because of the absence of such protection, Bethlehem would have had no right whatever to claim anything other than its fixed fee, irrespective of the extent to which costs might have been reduced by increased efficiency, if such reduction in costs was overcome, in whole or in part, by an increase in the cost of materials or by other cost increases beyond the

*Petitioners' statement (Br. 7) that "The allowance for a rise in material prices was admittedly excessive" is not supported by the findings or the evidence, and specifically is not supported by any of the four references cited by the petitioners in its support, viz. R. 1047, 1252, 1268 and 1548.

control of the contractor. The estimates were purposely made liberal in order to afford an opportunity to cut under them.

The parties chose to treat the contract and the several elements of cost in their entirety, and provided an incentive to the contractor to keep down cost, by means of a simple formula which, as the Master and both the lower courts found, was to the mutual advantage of the contractor and the Fleet Corporation (F. 12, R. 684; R. 736, 2330).

At R. 1502 Piez illustrated that the form of contract adopted, if it resulted in increased profit to the contractor, resulted also in reducing the cost of the ships to the Fleet Corporation as compared with the cost to the latter under a lump-sum contract based on the same estimated cost.

It might be that, looking back 23 years, and in the light of knowledge of what actually happened in the performance of the contracts, one might think it better to have fixed a base cost which, instead of being liberal, was an estimate of bare cost at existing wage and price levels; to have protected the contractor against all elements of increase beyond its control and to have made the contractor's share of savings dependent upon a comparison of the estimated cost, as adjusted for all such increases, with the actual cost ascertained on completion of the vessel. Or, looking backward, it may appear preferable to have imposed some limitation on the operation of the "half-savings" clause, or to have devised some formula more elaborate than that which the contracts provided.

But the parties, with their eyes open, chose to adopt the simple device of a "half-savings" clause, believing it to be to their mutual advantage (R. 554), as did also the Master and both courts below (F. 12, R. 684; R. 736, 2330). It

turned out to be so, since the ships built under the contracts in suit cost the Fleet Corporation, as the Master found, "less, for the value received, than the cost under contracts with other shipbuilders" (R. 568).

Whether the contracts, interpreted according to their terms, were unconscionable, or were opposed to public policy, or were unsupported by adequate consideration, are questions of law arising under the contracts as written. There is no warrant, however, for interpreting the contracts otherwise than in accordance with their express terms.

II

The contention that Bethlehem made no efforts to increase efficiency, and that savings did not result from such efforts, is not supported by either the findings or the evidence, and is contrary to both the findings and the evidence.

The petitioners commence their argument (Br. 15) with the bald assertion that "The Master and the District Court found that there was no evidence that the difference between the actual and estimated costs of the vessels was due to any increase of efficiency due to Bethlehem's efforts. The opinion of the court below is in accord".

Neither the Master nor the District Court was asked to make any such finding; nor did either make any finding which has even a semblance of such a meaning. And the Circuit Court of Appeals found precisely to the contrary (R. 2330).

Nor is there any finding or any evidence to support the petitioners' assertion (Br. 16)—which is the underlying premise of much of their argument—that "the cost of the

vessels constructed by Bethlehem would have been the same, if the contracts had contained no bonus-for-savings clause" —if, in other words, the contracts had been straight cost-plus contracts.

That assertion, which flies in the face of the findings of the Master and both courts below that the half-savings provision of the contracts was advantageous to the Fleet Corporation, and in the face of testimony of witnesses for both sides that straight cost-plus contracts inevitably involve waste and disorganization (R. 1338-9, 1499, 1622), is based upon a single finding of the Master, and upon certain cost comparisons which petitioners make and from which they draw the inference that Bethlehem made no special effort to reduce costs, but that the low costs which it attained were due solely to the fortuitous circumstance that the ending of the war resulted, automatically and with no effort on Bethlehem's part, in an increase in the efficiency of labor.

The single finding of the Master on which the petitioners rely is No. 279 of their Requests for Findings (R. 678). It is as follows:

> "There is no evidence that the cost of construction of the respective tank and cargo ships in controversy was reduced as a result of the 'bonus-for-savings' provisions of the respective contracts."

Obviously that finding does not mean that Bethlehem made no effort to increase efficiency, nor does it mean that efficiency was not increased, or that anticipated losses of efficiency were not prevented, by virtue of Bethlehem's efforts. The finding means no more than it says. Respondents did not except to it, because it is literally true, and in the nature of things it could not be otherwise. For in

order to isolate the half-savings clause of the contracts, and to show what effect it had on costs, one would have to know how much the ships would have cost if the clause had been omitted from the contracts, and the ships built on a straight cost-plus basis.

Obviously no one could give any *competent* testimony as to what Bethlehem's costs would have been under a situation which never existed. Hence, as we have said, the Master's finding No. 279 is literally and necessarily correct.

But the finding has no bearing on either of the propositions which are at the bottom of petitioners' argument. It does not establish, nor does it tend to establish, (1) that Bethlehem did not make the most strenuous efforts to increase the efficiency of its shipyards, or (2) that during the period of construction of the various ships it did not greatly increase their efficiency.

The Master did not make any finding, and the petitioners submitted to the Master not a single request for a finding, which, if found, would support either of those propositions. Except for Finding 279, above quoted, their Requests for Findings were not directed to the facts of cost and efficiency, considered in the light of what actually happened, but were stated as of the dates when the contracts were negotiated and made, and dealt with the possibilities which might result under the contracts as written.

Among such Requests for Findings there was a considerable number by which it was sought to show that the estimates of probable cost were not such as to require any increase in efficiency, in order to enable Bethlehem to participate in savings (Req. 268); that such estimates were not such as to make the amount of savings "substantially commensurate with economies resulting

from increased efficiency of management and labor" (Req. 270); that the realization of savings did not require Bethlehem to assume the risks of strikes, labor shortage or other contingencies (Req. 272); and, finally, that the estimates were not the lowest prices which would have afforded Bethlehem a reasonable opportunity to effect savings through efficiency (Req. 274), and were not "fair and reasonable estimates of probable approximate cost" of the ships "for use in connection with the 'half-savings' form of contract" (Req. 275).

All those Requests for Findings were denied by the Master, and in each instance the denial was accompanied by a statement either that the proposed finding was not supported by the evidence, or that the evidence was to the contrary (R. 675-7).

The Master's denial of those requests, and his comments thereon, are utterly inconsistent with the propositions now asserted by the petitioners; and had he been asked to find either that Bethlehem made no efforts to increase efficiency and effect savings, or that its efforts were not productive of savings, he would most certainly have denied those requests as contrary to the evidence.*

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*A necessary corollary of the petitioners' argument is that the reduction under estimated cost did not result from care in the execution of the contracts and "proved that the estimated cost was inordinately high" (Br., p. 12). The petitioners requested a finding that the savings "resulted from the gross and improper inflation of the estimates of cost designated as base prices in the respective contracts", and the Master denied such request as "not justified by the evidence" (Req. 278, R. 678).

(a) *As to Bethlehem's efforts to increase efficiency.*

The petitioners' argument that Bethlehem made no special efforts to increase efficiency, in addition to being absurd in view of the results which it produced as compared to other shipbuilders, is a curious composite of assertions which are either irrelevant or contrary to the evidence.

Cost comparisons of various ships are set forth in the petitioners' brief, and great stress is laid upon an inference sought to be drawn from the showing stated to be made thereby, that the only element of cost showing a progressive decline during the contract period is the cost of labor. But there is nothing remarkable about that fact, first because material prices fluctuated widely during the contract period (Exh. B-32, R. 1932, offered, R. 1469, and the tables compiled therefrom at pp. 25-6 of petitioners' brief), and second because efficiency in shipbuilding, as in any similar activity, depends primarily upon the efficiency of labor.*

Nor is the efficiency of labor reflected only in the figures for "Labor". The ideal of operating efficiency is to maintain a labor force which will have the maximum of pro-

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*Petitioners in their statement of facts say that Bethlehem's estimates of cost for the first group of ships assumed that there would be a "42% increase in freight rates". What they refer to is the fact that an allowance of 10¢ per ton was made in the estimates for increases in freight rates and other increases in delivery costs, resulting from the disruption of transportation under the war conditions.

Freight rates actually increased 25% (General Order No. 28 issued by the Director General of Railroads May 25, 1918, United States Railroad Administration Bulletin No. 4, p. 86), and there can be no question but that other delivery costs also increased. No witness for the petitioners either criticized or made any objection to this 10¢ per ton allowance.

ductivity, which will require the minimum of supervision, and which will handle the material so as to reduce to the minimum the amount of spoilage—a very important factor in the conditions existing while the ships in question were being built (R. 1348). Efficiency of labor is thus a major element in both material costs and plant operating expense.*

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*With reference to the tables at pages 25-6 of petitioners' brief, petitioners say (Br. p. 27) regarding the contracts there shown that the cost of materials, as compared with earlier contracts, rose in four instances and fell in four. That statement is literally true. But the petitioners have failed to direct the Court's attention to the fact that, in making three of the four comparisons in which the cost of materials was greater, they have in one case compared the cost of materials under later contracts with the cost under contract No. 191, which covered the construction of four so-called stock ships, for which substantially all the materials had been purchased and were on hand when the contracts were negotiated (F. 97, R. 612), and in the other case have compared the later cost with the cost of materials under contract No. 196 for the construction of another stock ship, for which likewise the materials had been purchased before the contract was negotiated (F. 99, R. 612). A stock ship was one that Bethlehem had designed to build for its own account before the requisition order of August 3, 1917 (R. 1949). The record does not show how the unit prices of materials under the earlier contracts compared with those for the later contracts, but presumably they were lower.

The petitioners are left, therefore, with but one comparison (the first on Br. p. 25) in which the cost of materials under a later contract was greater than the cost under a comparable earlier contract. Since both of these latter contracts cover construction on the West Coast, the increased cost of materials could well have been due to increase in freight rates. (See footnote, p. 37. The later contract, No. 301, dated April 30, 1918, was executed and delivered on May 27, *1919*. Exh. A; R. 1697.) In any event the cost of the tankers was less by $110,000 each under the later contract than under the earlier contract (Br. p. 25). This result does not reflect any failure to increase efficiency.

The magnitude of Bethlehem's problem, in relation to labor efficiency, can be seen from the fact that between January 1, 1918, and the peak of production in 1919, the number of employees in its shipyards was increased from some 15,000* to over 70,000, the additions to the force being, as graphically described by a witness, "Shoemakers, doctors, merchants, cloth weavers, almost anybody who happened along and wanted a job at good wages" (R. 1347). Not only was it necessary for Bethlehem to train these new men, but it was necessary to replace its skilled and experienced shipbuilders, who were being taken away for supervisory positions in the various new shipyards which had sprung up to meet the emergency (R. 1348).

The methods which Bethlehem was using to train such men and attain greater efficiency of labor are referred to by the Master in two findings, which he made at the request of the petitioners (R. 608):

> "87. During 1917 Bethlehem changed many of its old established shipbuilding methods under which a workman had been trained to do a great many different things, and substituted a system of specialization, which was being very rapidly developed during the latter part of that year, under which it was possible to train workmen very rapidly for the particular or special work assigned to them."
>
> "88. The various methods adopted by Bethlehem with respect to training workmen and increasing their efficiency were being very rapidly developed during the latter part of 1917."

That the efforts of Bethlehem as set forth in the findings continued in full vigor throughout the period of the con-

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*Even this number was double the force employed prior to the war (R. 1347).

tracts is not denied by the petitioners. Nor is it suggested that the training of men while the force increased by 55,000 after January 1, 1918, was not an infinitely greater task, requiring much greater efforts, than the training of a small fraction of that number in 1917.

But all those efforts are brushed aside as irrelevant, on the ground that they were started before the contracts were signed (Br. 29-30), the petitioners' theory apparently being that efforts to increase efficiency after the signing of a contract must be disregarded unless they are different in kind, as well as in degree, from efforts antedating the contracts. The absurdity of that contention is too apparent to require further argument.

It may be that, if the ships had been constructed under a lump sum contract, Bethlehem might have made greater and more successful efforts to keep the cost down, and yet the result would have been that the ships cost the Fleet Corporation more and yielded to Bethlehem a greater profit. The Master found that the estimates were as nearly accurate as could be made under the circumstances; consequently estimated cost represented the minimum at which any contractor would have been justified in taking the contracts on a lump sum basis. Had the ships been built under lump sum contracts for the amount of the estimated cost and fixed fee, with Bethlehem getting all the benefits of savings made, and thus getting much greater profits than were actually realized, we understand that the petitioners would not complain unless it be true, as suggested in their petition for certiorari, that no contract with any Governmental agency in time of war is binding, and that whatever the contract or the result, it is for the courts to determine how much the contractor should receive.

Petitioners object to Bethlehem's profits, though admittedly less than would have been realized under fixed price contracts, on the ground that the half-savings contracts were "riskless" contracts; and they seek to have this Court accept, and enact into law, an economic doctrine that "profits * * * are a reward for the assumption of risk" (Br. 62).

But profits may be considerably more or considerably less than a reward for the assumption of risk in a particular transaction. In the present case they may be regarded, in part, as a reward for the assumption of the risks taken by those who had invested tens of millions of dollars in the plants and business of Bethlehem (Exh. B-12, R. 1932, offered, R. 1540); for the business foresight which built up those plants, in a very few years prior to 1918, to a point where it was, as petitioners say, "the largest shipbuilding company in the world", and to a point of operating efficiency where it was able to undertake the gigantic program of shipbuilding which the Navy Department and the Fleet Corporation entrusted to it.*

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*The Circuit Court of Appeals said (R. 2329):

"It must be recalled, as the special master pointed out in his report, 'that Bethlehem was an old line shipbuilding company, carrying the burdens of idle invested capital over long-time periods, the maintenance of an experienced and expensive organization, which, during periods of inactivity in the shipbuilding industry, probably was not productive of overhead, such as maintenance, taxes, and other carrying charges. All of these, however, were charges incident to the standby service rendered by Bethlehem, to enable it to perform active service when the needs of the Government might require it. It may well be, as Bethlehem contends, that these factors must have been taken into consideration by the representatives

Profits also may be a reward for devotion of property and management to a task, for services performed, ships built and results achieved. That is what they were intended to be in this case. The possibility of profits, over and above the fixed fee, was held out by the Fleet Corporation to the contractor as an incentive to activities which, if successful, would be beneficial to the Fleet Corporation and, therefore, indirectly to the Government.

The reward was offered; the hoped-for result was produced; and it seems hardly within the scope of the judicial function for this Court now to throw aside contracts made 23 years ago, and to re-write them so as to apportion differently the benefits which the contractor and the Fleet Corporation had agreed to share.

Petitioners' glib assertion that Bethlehem's "cost of construction" of the ships would have been the same under a straight cost-plus contract is without support in the findings or the evidence. Of course, as we have pointed out, no one could prove what costs would have been under a straight cost-plus contract. But the principal representative of each of the contracting parties, Piez (R. 1499) and Powell (R. 1238-9), testified from his own experience that cost-plus contracts are demoralizing, and an invitation to waste. It is well known that straight cost-plus contracts worked out very badly in many situations during the World War, and that during and after the War Congress in a

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of the Fleet Corporation in their determination that, regardless of the opportunity which the contracts would afford to Bethlehem for substantial profits, it was worth the extra cost, if any, to the Government to place the contracts with an old line company to insure the continuous service of Bethlehem so long as the war needs might call for it'."

number of appropriation bills* specifically forbade the use of the cost-plus form of contract. The defect in cost-plus contracts is due, not to deliberate inflation of costs on the part of the contractor, but to the difference in the psychological responses of an organization of many human beings to incentive on the one hand, and to lack of incentive on the other.

But, as we have said, there was no evidence, and there could be no evidence, as to what Bethlehem's costs would have been under a straight cost-plus contract, except opinion evidence as to what ordinarily happens under such contracts. So far as there is opinion evidence in the record, it is unanimously to the effect that the costs would have been higher under simple cost-plus contracts, and that therefore, as found by the Master and by both courts below, the contracts were more advantageous to the Fleet Corporation than simple cost-plus contracts would have been.

That Bethlehem's efforts, under straight cost-plus contracts, would have been as vigorous as those which it made under the half-savings contracts is of no importance, since both Bethlehem and the Fleet Corporation believed that those efforts would be more successful under the latter type of contract than under the former.

Moreover, no witness for the petitioners criticized those efforts, or suggested that the Bethlehem organization, from the president to the lowest rank of workmen, did not commit itself wholeheartedly to the enormous and difficult task of building, at top production speed, 83 ships for the Fleet Corporation, in addition to a large number of ships for the

*E.g., Act of May 16, 1918, 40 Stat. 550; Act of March 6, 1920, 41 Stat. 503.

Navy. The Master found that the Government had greater "value received" from that organization than from other shipbuilders (R. 568); and Bethlehem is content to be judged by the results.

(b) *As to increases in efficiency actually realized.*

In arguing the proposition that Bethlehem's efforts to increase its efficiency produced no result in savings, the petitioners seem to assume that an ascertainable standard of efficiency* existed in the yards at the time when the contracts were signed, and when a total of some 15,000 men were employed; that, without any efforts on Bethlehem's part, that standard would automatically continue to exist while the force was being increased to 70,000, and that Bethlehem's efforts must be regarded as non-productive, unless the per man efficiency average of the 70,000 men can be shown to have been greater than that of the 15,000 men. These assumptions take them through the first 9 months of the contract period (during which the greatest

*There is considerable confusion in the petitioners' brief as to the base or norm from which one might determine whether there had been an "increase" in efficiency. On page 16 they refer to "the normal standards of efficiency" (but without indicating, either there or elsewhere, how anyone could determine what standards were "normal"). At other points in their brief they appear to be referring to the standards of efficiency, whatever they may have been and however they might be determined, which existed in the Bethlehem yards at the time when the contracts were made.

One would suppose that "normal standards of efficiency" would be those generally prevailing among shipbuilders at the time, and that the organization which produced the ships at the lowest cost would be ranked, *ipso facto*, as the one that had attained the greatest success in bettering the "normal standards". However, petitioners appear to think otherwise.

expansion of the labor force occurred) and up to the time of the Armistice; and they argue that, during that 9-months' period, labor efficiency was not increased.

The petitioners concede that labor efficiency was greatly increased from then on. But, because some of the conditions which made the labor problems difficult ended with the Armistice, they argue that any increase in efficiency following that time must be attributed solely to the ending of the War, and must be regarded as having come about automatically, without any action or effort on the part of Bethlehem, and therefore must be treated as being purely fortuitous and in no part attributable to Bethlehem's managerial efforts.

In other words, the petitioners' argument is based upon the proposition that if, in spite of Bethlehem's efforts, there was an increase in labor cost prior to the Armistice, those efforts must be disregarded, however much they may have reduced the cost of the ships; and that, because the ending of the War made it easier for Bethlehem to increase the efficiency of labor, its efforts after that date must be disregarded, however much they also may have reduced the final costs.

The Circuit Court of Appeals, after finding that the half-savings form of contract was a desirable one from the standpoint of the Government, said:

> "We need only add that the record contains some evidence tending to show that the savings resulted, in part at least, from increased efficiency" (R. 2330).

This statement is fully sustained by the evidence and is, in fact, demonstrated by the tables set forth in the peti-

tioners' brief* (pp. 25-6). That efficiency of labor increased during the progress of the contracts is also indicated by a comparison of direct labor hours (Exh. B-33, R. 1931, offered, R. 1537). The comparison is interesting in the light of the allowance made by Brown for decrease in efficiency of labor (Exh. G-154, R. 1852, offered, R. 920; R. 854) and of Powell's statement of labor conditions at the time the contracts were entered into, of his fear that they might get worse, and of his hope not only to hold them level but to improve them (R. 1367-8).

When Brown made his estimates, he had before him the completed figures for the building of a 9100-ton tanker at the Fore River plant (Hull 253). This vessel and its sister ship (Hull 254) were built between May, 1916, and July, 1917, and were the last vessels of such size and type

*Petitioners point to fluctuations in the amounts of plant operating and overhead expense incurred on ships under successive contracts at the same yard as evidence of failure to increase efficiency (Br. 27). Plant operating expense includes both cost of labor (commonly known as indirect labor) and cost of materials (as for power, heat, light, maintenance, etc.), as well as property taxes, and would quite naturally fluctuate with variations in such costs, many of which are beyond the control of the shipbuilder.

Moreover, the apportionment of total plant operating and overhead expense to the cost of individual ships is on the basis of the work being done in the yard from time to time. Such expense does not vary proportionately with any increase or decrease in the amount of work under construction, since some elements of it remain constant, or substantially so, under varying conditions of plant load (R. 855-6). The cancelation by the Fleet Corporation of ships under contract for construction at Union and Sparrows Point after work on them had been begun (Exh. A, R. 1697, 1701; Exh. B, R. 1714, 1716) naturally increased the ratio of the apportionment to other ships remaining under construction at those yards of plant operating and overhead expense.

completed before Bethlehem's estimates were submitted in December, 1917 (R. 1533-4). Brown took the cost figures of Hull 253 and estimated the increase in cost that would result from new wage rates which, at the direction of the Fleet Corporation (R. 1650), were being put into effect in November and December, 1917. He estimated that further increased cost of labor, amounting to 30 per cent., would result from decrease in the efficiency of labor already experienced since the completion of Hull 253 and further decrease therein to be expected, and made allowance therefor in his estimates (Exh. G-154, *supra;* R. 852-4).

That his findings were not too liberal is attested by the fact that a comparison of Hulls 253 and 254 with the next ships of the same type to be completed at Fore River (Hulls 268 and 269, built in the period from June, 1917, to June, 1918) shows an increase in direct labor hours of more than 40% (Exh. B-33, R. 1931).

From that point on, the trend was the other way; and the same exhibit shows that between Hulls 268 and 269, which were under construction when the first contracts were made, and the ships built under Contract No. 183 (Hulls 376, 377 and 378) there was a decrease in direct labor hours of 25%; and the same comparison for the later tankers, constructed under Contract No. 299, shows a decrease of 40%.

Powell testified that his problem at the time of the negotiations was to prevent labor conditions from getting worse than they were, and then to improve them, and that by so doing he expected to accomplish savings under the contract (R. 1368-9). When the contracts were made, the labor situation at the Harlan yard particularly was very bad, and if the conditions there had spread to other yards,

which was entirely likely, it would have removed any hopes of making any savings under the contracts, and actual costs would have "considerably exceeded the base prices * * * submitted" (R. 1367-8).

Labor conditions at the various plants were not uniform, those at Harlan being worse than those at Sparrow's Point, and those at Sparrow's Point worse than at Union and Fore River (R. 1368); but everywhere they were bad (R. 1347-8; 1498). As conceded in the Government's brief (p. 29), Powell testified that Bethlehem was "very successful under the conditions" in giving its "foremen and bosses" an incentive to increase the efficiency of the yards (R. 1369-70), although conceding that labor conditions materially improved after the Armistice. So far from testifying that improvement began then, however, he testified specifically that

> "They were better at the time of the Armistice, considerably better than they had been when we signed these contracts, but they improved more rapidly after the Armistice." (R. 1370)

The petitioners' counsel asked Powell the following question on cross-examination and he made the following answer:

> "Q. As a matter of fact, Bethlehem succeeded, as I understood it, in its efforts to increase the efficiency of labor at its various shipyards, with the exception possibly of the Harlan plant, from early in the year 1918, did it not?
>
> "A. We got better control of our labor from early in 1918, and we did improve the efficiency of our labor at all of the plants, and improved it some at Harlan, although less at Harlan than at other plants." (R. 1436)

Results accomplished at Harlan strikingly illustrate the accuracy of Powell's description of labor conditions and of the improvement made therein. They also evidence the impossibility of making anything like an accurate estimate of what costs were going to be. Contract No. 178, which was one of the original contracts growing out of Powell's proposal of December 19, 1917, included three 7500-ton tankers to be built at Harlan in addition to three cargo ships. The estimated cost of the tankers specified in the contract was $1,612,000 each. *The average actual cost, exclusive of wage increase and changes and extras, was $1,675,000* (Exh. B-32, R. 1932, offered, R. 1469), or $63,000 in excess of Brown's estimate.

The following comparison, which is also set out in the petitioners' brief (p. 26), of costs incurred on the above-mentioned tankers built under Contract No. 178 and on similar tankers constructed at Harlan under a later contract (No. 314) is interesting (Exh. B-32, *supra*):

	Contract 178	*Contract 314*
Material	$625,288	$603,895
Labor	589,094	384,586
Operating Expense	422,680	276,794

These figures show very little variation in material cost, but a decrease in the cost of labor of 34%, or, conversely stated, an increase in labor efficiency of more than 50%, with a corresponding decrease in operating expense.

This absolutely confirms Powell's testimony. It also illustrates the absurdity of the petitioners' position. They

have no complaint regarding the tankers built under Contract No. 178, because the costs over-ran the estimate and Bethlehem stands to make no profit except the fixed fee, which is less than 10% of the actual cost. Yet they complain of Contract No. 314, because Bethlehem stands to make a profit of approximately 21%, although the actual cost to the Fleet Corporation of the ships constructed under it, including fixed fee and half-savings, but exclusive of wage increase and changes and extras, is only $1,592,000 per ship as compared with $1,835,000 under Contract No. 178. In other words, the position of the petitioners is that they have no objection to paying in accordance with the provisions of the contract in the case where Bethlehem's efforts to increase efficiency proved abortive, but object to paying any premium for efficiency, even though they receive the benefit of it.

The fact is that Bethlehem performed a major feat of management in absorbing, into an organization geared for 12,000 to 15,000 employees, 55,000 green men, under the most disorganized labor conditions that have ever existed in this country (R. 1498, 1367-8).

The petitioners in their brief (p. 26) compare the labor cost in dollars under Contracts 183 and 299, and from this comparison draw the conclusion that such saving in labor cost cannot be attributable in any degree to any efforts on the part of Bethlehem, but only to the fortuitous circumstance that the War ended before the ships were completed. It has failed to direct the Court's attention to the comparison between the direct hours of labor on the ships constructed under Contract 183 (the earlier of the two contracts contained in the petitioners' table) with the

ships under construction at the time when the contracts were let, which, as stated above (p. 47), and as the exhibit shows, reflects a decrease of 25%.*

Petitioners' effort to explain away the great increase of labor efficiency which occurred over the contract period overlooks the most important of all the factors in the problem—the element of time. The training of manual workers, and the welding of a large group of untrained men into an effective working force, is not a process which occurs instantaneously. While it is true that the ending of the World War eliminated some of the conditions which made the labor problem a very difficult one, it would be absurd to suppose that the parties did not contemplate that the performance of the contracts would be subject to the

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*At page 27 of the petitioners' brief, and again at pages 39 and 50, the statement is made that Brown testified that the efficiency of labor prior to the Armistice decreased more than 30% and that all the increase of efficiency occurred after that date. This statement is obviously intended to represent a comparison of labor conditions at the time when the contracts were entered into and during the intervening period until the Armistice. The record references cited in support of the statement show that Brown's testimony was directly to the contrary and fully corroborated Powell's testimony quoted at page 48 above. Both at pages 1063-64 and at pages 1531-37 the record shows that Brown was testifying about loss of efficiency shown by a comparison of labor cost incurred on Hulls 253 and 254, the "base ships" completed in June and July, 1917, and on the cost of which he had based the estimates that he made in November and December, 1917, and labor cost incurred on Hulls 268 and 269, requisitioned ships built between June, 1917, and September, 1918 (See also Exhibit B-33, R. 1537). Brown's testimony at R. 988-89, also cited in support of the Petitioners' statement, is to the same effect. This oft-repeated statement so much relied upon in the brief is without support in the evidence.

variable conditions of life, or that they had in mind some theoretical standard of efficiency which the contractor was supposed to better. The only intelligent purpose that can be attributed to them is that the half-savings clause would stimulate the contractor to attain the greatest efficiency that was possible under whatever the conditions might turn out to be; that, in short, the contractor would do his best to overcome the adverse factors that resulted from the War and that, if the War should end, the contractor would continue to overcome such adverse factors as might still exist and attain, at all events, the maximum efficiency that was attainable.

III

The authorities cited by the petitioners do not support the proposition that the "half-savings" provision of the contracts was without consideration.

Petitioners contend (Br. 46, 49) that there is a long-established "Court of Claims doctrine" that so-called bonus-for-savings clauses in government contracts are severable from other price provisions thereof, and may not be sustained without proof of an independent consideration therefor or, more specifically, proof that savings actually resulted from some special efforts on the part of the contractor—efforts which the contractor would not have been required to make, if the contract had been an ordinary cost plus contract, without the half-savings clause.

Five cases decided by the Court of Claims are cited for that contention, which is admitted by the petitioners

to be inconsistent with the "general rule of contract law" (Br. p. 43).

No such doctrine has ever been announced either by the Court of Claims or, in so far as we know, by any other court. It is thoroughly unsound, not only as a matter of contract law but as a matter of ordinary common sense. All the Court of Claims cases cited by the petitioners except *Burke & James, Inc.* v. *United States*, 63 Ct. Cls. 36, are cases where the Government, having already in force contracts covering, for example, the making of Army uniforms out of Government-owned materials, had entered into supplemental agreements with the contractors by which the Government agreed to pay them, as an inducement to economize on Government materials, a share of the value of the materials saved by some special efforts on the part of the contractors.

In such cases, the Court of Claims applies the rule that the supplemental contract is without consideration unless the contractor is required to do something that the original contract did not obligate him to do; and that, in order to recover under the bonus-for-savings contract, he must prove that savings were effected by performance under that contract, rather than merely by the fulfillment of his pre-existing obligation under the original contract.

Thus it will be seen that the cases stand for no propositions of law more advanced than that a promise must be supported by consideration, and that a plaintiff must prove his case in order to recover.

Burke & James, Inc. v. *United States, supra*, is an entirely different kind of a case. There the Government had hired the contractor to design a model airplane camera, the rights to which had been acquired by the Government from

the inventor. The job was done and the contractor was paid $30,000. Thereupon the Government asked the contractor to bid on 200 similar cameras, and the contractor did so, quoting a flat price of $1,763 per unit.

The Government then asked the contractor to disclose the amount of profit which would accrue to it on the basis of that proposal, and the contractor advised: "Our maximum profit will be approximately 10½%."

Thereupon the Government submitted and the contractor accepted a form of contract under which the contractor would be paid the actual cost of manufacture, a fixed profit of $173 per camera, and a "bonus for savings" equal to 25% of the difference between the actual cost and the estimated cost of $1,590 each (which was the amount of the contractor's bid less the $173 fixed profit, the fixed profit thus being slightly more than 10½% of estimated cost). Actually the cost of the cameras turned out to be $634.80 each, or only 39% of the estimated cost.

The contractor sued for amounts due under the bonus-for-savings clause, and the Government counterclaimed for excess amounts paid in error on account of cost.

The court found that the Government had relied upon the accuracy of the plaintiff's estimate, plaintiff being the only one who had ever manufactured such a camera, and the Government's representatives being totally ignorant of manufacturing costs thereof; that the plaintiff's representation that $1,763 per camera would produce a *maximum* profit of 10½% had been the result of an "egregious error"; that there had not existed "the faintest possibility of the cameras costing the estimated cost fixed in the contract"; that the price was "far more than the article can possibly be worth"; that to allow recovery would

be to permit the plaintiff to take advantage of "an error so palpably wrong that to take advantage of it is imposing a penalty upon the defendant who clearly relied upon its accuracy", and that profits of 64%, when the plaintiff had represented that the maximum would be 10½%, were "gross, exorbitant and unreasonable".

Thus, obviously, the court held that the contract was voidable on the ground either of misrepresentation, or mistake, or over-reaching, or on a combination of them.*

If the decision in the *Burke & James, Inc.* case was based upon a holding that the bonus-for-savings provision of the contract was severable from the other provisions thereof for the payment of consideration to the contractor, and required proof of consideration other than the performance by the contractor of the obligations undertaken by him, it is unsound and unsupported by any authority.

If today, when again a state of emergency exists and future costs may be thought uncertain, one wishing to build a factory should agree with the contractor that, because of the disadvantages of a lump sum contract on the one hand and a straight cost plus contract on the other, the contractor should be paid his cost, a fixed fee, and one-half of the amount by which actual cost should be less than an estimated cost agreed upon by the parties, we believe that no one would contend that the three specified elements of compensation—cost, fixed fee and half-savings—do not constitute the consideration moving to the contractor for his performance of the contract; nor do we think that any one would contend that, because the contractor was under obligation,

*It should be noted that in the *Burke & James, Inc.* case the Government conceded the contractor's right to receive the fixed fee of $173 per camera, which was over 27% of cost.

whether by the terms of the contract or by operation of law, to avoid excessive costs in the performance of the contract, he ought not be entitled to the benefit of the half-savings clause, except upon a showing on completion of the contract that a higher cost would have occurred in the absence of that clause.

The Circuit Court of Appeals for the Sixth Circuit said in *Dayton Airplane Co.* v. *United States,* 21 F. (2d) 673, in which recovery under a bonus-for-savings clause was sustained as against the claim that it was void, because against public policy and because the resulting profits were unconscionable (p. 683):

> "Even if the subject were otherwise open, it would be difficult to set aside only one contract provision which formed a part of the consideration for the counter promises."

The Circuit Court of Appeals said in the present case (R. 2330):

> "We agree with the Circuit Court of Appeals for the Sixth Circuit, which in Dayton Airplane Co. v. United States, 21 F. (2d) 673, had a similar contract before it, that * * * the bonus for saving provision which formed part of the consideration for Bethlehem's agreement to build the ships may not, alone of all the provisions in the contract, be set aside as unenforceable and void."

The promise of Bethlehem was to build the ships. The consideration moving to Bethlehem was the promise of the Fleet Corporation to pay the price agreed upon. The Fleet Corporation's promise to pay under the half-savings clause was as much a part of the consideration for Bethlehem's promise to build the ships as was the Fleet Corporation's

promise to pay the cost and the fixed fee. The Circuit Court of Appeals so held. It said (R. 2329):

> "It must be concluded that the contracts were entire and that the bonus for savings formed part of the consideration for Bethlehem's obligation to build the ships."

It is not clear whether or not petitioners' contention is based on the fact that a government agency, the Fleet Corporation, was a party to the contracts. In any event there is no basis for any distinction in that regard between a contract made by the Fleet Corporation and one made by any other person. The contracts of the Government are subject to the same rules regarding their interpretation and enforcement as are the contracts of private individuals.

> *Lynch* v. *United States,* 292 U. S. 571, 579, and cases cited.

A fortiori that is true of the contracts of the Fleet Corporation.

> *Sloan Shipyards Corporation* v. *Fleet Corporation,* 258 U. S. 549;
>
> *United States* v. *Wood,* 290 Fed. 109, affirmed 263 U. S. 680;
>
> *Fleet Corporation* v. *Harwood,* 281 U. S. 519.

Failure of consideration cannot be found when the party asserting it gets the consideration which he has bargained for, much less when he gets also the accompanying benefits which he has hoped to obtain as a result of his promise —in this case the construction of the ships at less cost than

would have been possible under either fixed sum or straight cost-plus contracts, and at a lower cost than similar ships constructed by other contractors.

Petitioners' arguments about special efforts, increased efficiency, severability of the half-savings clause and failure of consideration are an elaborate tissue of words, without support in the findings, the evidence, or the decided cases.

IV

The contentions of the petitioners that the contracts were made under circumstances amounting to duress and that they were unconscionable, either because of the circumstances under which they were negotiated or for any other reason, are without support either in fact or in law.

(a) *There was no duress.*

The picture painted in the petitioners' brief, as a background for their contention that the contracts were made under circumstances amounting to duress, is that in the negotiation of the contracts the representatives of the Fleet Corporation were urging Bethlehem to undertake the construction of the ships which the Government had to have, and that Bethlehem held back, refusing to do the job except for its "pound of flesh", and taking advantage of the necessities of the Government to exact a price known to both parties to be inordinately high.

That the picture is plainly and demonstrably false will be seen from a brief review of the negotiations.

In August, 1917, the Fleet Corporation requisitioned all merchant ships of more than 2500 tons deadweight under construction in Bethlehem's yards and in other yards (R. 527). Thereafter Bethlehem entered into negotiations with the Navy Department, as a result of which a contract was made on December 6, 1917, for the construction of 85 destroyers (R. 579). It was in these negotiations that the idea of the half-savings clause was first put into practice (R. 627).

The war emergency required that the Fleet Corporation take up the entire balance of Bethlehem's capacity, for the building of tankers and cargo and troop ships. Accordingly, Bethlehem's representatives were summoned to Washington for a conference with representatives of the Fleet Corporation on December 12, 1917, and were on that date told to submit a proposal for the building of whatever additional tonnage their yards could build.

Bethlehem sent in its proposal within 24 hours, in its letter of December 13. It was in that letter that Powell referred to the impossibility of quoting fixed prices at any reasonable figure, and suggested the half-savings form of contract, upon the same terms as had been agreed upon with the Navy Department (R. 578-9).

At a further conference, the Fleet Corporation told Bethlehem what ships Bethlehem was expected to build, and at what yards, and asked for a specific proposal (R. 1352-3). Within 24 hours, to wit on December 20, 1917, Bethlehem submitted its proposal, setting forth its suggested basis for estimated cost (R. 582-7).

The Fleet Corporation's representatives expressed no opinions on the proposals, until January 3, 1918. In the meantime, on December 20, Powell met Messrs. McBride

and Day, who had just returned from a mission to the British Admiralty, and learned from them how much more serious the submarine warfare was than the public had been permitted to know (R. 1361-2). On the next day Powell went to see Piez, to record the fact that he did not propose that his company should be responsible for any delay in getting the enlarged construction program started; and at that meeting he made the offer, which he later confirmed by letter to the Fleet Corporation, to take the contracts on any basis that Piez might determine. That letter, which was dated January 3, 1918, stated (R. 588):

> "This will confirm the statement then made [*i.e.*, on December 21] that while this company cannot undertake any capital expenditures at its expense, if the terms in our proposal do not otherwise meet with the Emergency Fleet Corporation's approval, we are prepared to accept the order to construct these vessels on such terms as may be personally determined by Mr. Charles Piez, the Vice President and General Manager, and strongly urge there be no delay in placing this order, as we are making this offer because of our knowledge of the vital emergency now confronting this nation in connection with the requirements for additional merchant vessels."

Piez then arranged a conference between Powell and Bowles, and their assistants. It took place on January 3, 1918, and it resulted in an agreement on the terms of the first contracts.

The petitioners in their brief lay great stress on the fact that Powell "insisted" on the half-savings form of contract. It should be noted, however, that the only opportunity that he had to "insist" was during the five-hour conference on January 3, during which Bowles endeavored

to persuade Powell to take contracts on a lump sum basis, and Powell maintained that, under the conditions which existed, it was impossible to do so except at prices that would be too high for the Fleet Corporation to pay (F. 20, 25, R. 578, 588). The result was that at the end of five hours the parties had come to an agreement on the use of the half-savings form of contract, and upon the terms.

Thus the petitioners' statement of the facts (Br. 6) is misleading when it refers to "repeated but unsuccessful efforts by the Fleet Corporation" to enter into lump sum contracts; and it is contrary to fact when it says that "Bethlehem would not undertake construction under any other type of contract".

It is of course true that, Bethlehem being the largest shipbuilding company in the country, and being one of the two or three companies qualified to build the first-class ships that were included in the Fleet Corporation's program, its facilities were necessary to the carrying out of that program (F. 5, 19, R. 574, 577). It is also true that, although the Fleet Corporation had the power to take over Bethlehem's yards, what it really required for the carrying out of its program was the use of Bethlehem's organization —its knowledge of how to build ships (R. 539). It is not true, however, that the Fleet Corporation was faced with even the slightest threat that Bethlehem would withhold its facilities except at its own price. On the contrary, as shown above, Bethlehem had declared in writing to Piez, the responsible head of the Fleet Corporation, that it would construct the ships on any basis that he should determine. It must be presumed that Piez would not determine any price or terms that would not be at least fair to the Fleet Corporation.

The petitioners make light of this offer on the ground that Piez was not a shipbuilder himself, and that Bethlehem's offer was not (what apparently the petitioners think it should have been) "an agreement to submit to any arbitrary price which might be set" (Br. p. 65). It is said that the offer "contemplated only a genuine judgment based on his [Piez's] own study and judgment". Of course it did; but to suggest that the offer was, therefore, of no consequence is patently absurd.

We do not suggest that, at his conference on January 3 with Bowles,* Powell did not strenuously advocate the form of contract that he believed sound, and strenuously defend his judgment as to fair prices. Of course he did. But if by doing so he exercised duress, then every Government contract is voidable for duress, unless the contracting party happens to accept whatever terms the Government first proposes.

Throughout this case, including their brief in this Court, the petitioners have sought to stress a supposed lack of knowledge or information on the part of the representatives of the Fleet Corporation who took part in the negotiation of the terms of the contracts, concerning the cost of construction of ships. They have closed their eyes to the fact

*Powell had been Bowles' assistant as Superintendent of Construction of ships at the Brooklyn Navy Yard (R. 1330) and later, while Bowles was president of one shipbuilding company and Powell was connected with another, a serious business disagreement occurred which created unfriendly relations between the two men (R. 1371-2, 1414). Powell later supplanted Bowles as president of the Fore River Shipbuilding Company (R. 1372). The negotiations between Bowles and Powell, and particularly the tone of Bowles' letter of January 5, 1918, must be considered in the light of their previous relations.

that on August 3, 1917, the Fleet Corporation had requisitioned all merchant ships under construction in shipyards in the United States except very small ones (F. 8, R. 575) and had entered into arrangements of various kinds with the shipbuilders for the completion of such ships. Moreover, as the Master found, Admiral Bowles and Radford were equally as competent shipbuilding experts as were Bethlehem's representatives Powell and Brown (R. 527) and fully competent to check Bethlehem's estimates (F. 19, R. 686).* The contention of the petitioners is, and throughout this case has been, that Bethlehem had superior ability to determine the probable cost of the ships because it had records of the cost of construction of similar ships built at earlier dates, whereas Bowles and Radford were without such knowledge, and that the basis of Brown's estimates was not "revealed" to them.

The fact is that the representatives of the Fleet Corporation never asked how the estimates were made up or how the amounts thereof compared with the cost of similar ships previously constructed. In view of the testimony of both Piez and Radford that they knew at the time that it was impossible to make close estimates of cost, it is entirely clear that the representatives of the Fleet Corporation knew that Bethlehem's estimates were not such; and the Master found that they were not expected by the Fleet Corporation to be such (F. 14, R. 685). The fact is that Bowles and Radford knew as much as any one about the then going price of ships, the factors involved in the cost of a ship and the uncertainties concerning future costs; and, as the Master found, their expert experience in shipbuilding enabled them to make an "educated guess" as to what the

*See p. 8, *supra*.

probable cost of the ships would be, as readily as Bethlehem's representative could (R. 619).

Had Bowles and Radford considered that, in order to pass judgment on Brown's estimates, they needed to know how those estimates had been made up, it would have been a simple matter, between December 19, 1917, the date on which Powell submitted his proposals, and January 3, 1918, the date on which the agreement was reached, for them to request such information and to check the processes by which Brown arrived at his opinion as to probable cost.*

*In normal times the estimated cost of a ship is determined by the application of quoted prices to bills of material containing thousands of items, with the addition of estimation of the cost of labor, overhead, allowances for contingencies, etc. (R. 1030-31). Such estimates take weeks to prepare, as was testified to by Bethlehem's witnesses (R. 1031) and not denied by the Government's witnesses, and as must have been known to both Bowles and Radford. Time did not permit of the making of such estimates for the various types and sizes of ships which Bethlehem was called upon to build for the Fleet Corporation, as both parties well knew.

Moreover, the impracticability of making such estimates by reason of inability to get quotations for materials from manufacturers, as well as by reason of rapidly changing conditions and uncertainty as to future conditions, had led to the complete disbandment of Bethlehem's estimating department before these negotiations took place (R. 1028-30, F. 5, R. 681). Consequently, Brown adopted a very simple method described in the evidence (R. 840-863; see also Exhibits G-154 and G-155, R. 1852, 1854, offered, R. 920, 921), consisting of the application of ratios, representing realized or anticipated increases in factors affecting costs, to each of four major accounting subdivisions into which cost of similar ships theretofore constructed were segregated, plus a customary allowance for contingencies.

As stated above, the petitioners' witness Sanford, called by them as an expert to criticize Brown's estimates, testified that he would have pursued the same method (R. 1316), although he also testified that in some respects he would have used different factors in the development of his ratios.

In ruling on the petitioners' Request No. 136 (R. 623), to the effect that the Fleet Corporation at the time of the negotiations did not know the cost to Bethlehem of materials theretofore purchased for the ships included in certain of the contracts, the Master said:

> "Affirmed. If deemed important, the Fleet Corporation could have obtained this information before signing the contracts."

And in ruling on the petitioners' Request No. 139 (R. 624), to the effect that it was impracticable for the Fleet Corporation to make any analysis of the estimates submitted by Bethlehem, the Master said:

> "Denied. The Fleet Corporation could have analyzed these estimates and compared them with other cost estimates had the Fleet Corporation deemed such a course to be an aid to educated guessing."

Indeed, if Brown had been asked at the conference on January 3 how his estimates were made, they could have been checked in a very few minutes. There is no question but that Brown's method of preparing his estimates was a proper one; the petitioners' own expert witness testified that he would have used the same method (R. 1316), and stated merely that in a few respects he would have used different factors for application to certain elements of the cost of construction of prior ships.

Petitioners, as we have said, seek to minimize the significance of Powell's offer to accept the contracts on any terms that should be determined by Piez, and suggest that, because Piez had no knowledge of shipbuilding costs, he was therefore not in a position to suggest any terms for

the pending contracts. Piez, however, could have called for any of Bethlehem's records that he might have thought desirable to enable him to act pursuant to Powell's offer, as well as the details that had gone into the making of Brown's estimates, and he had not only Bowles and Radford, but Cox as well, to advise him as to the probable accuracy of Brown's figures.

The Master found (R. 531-2) that Powell made the offer to accept the contracts upon any terms that Piez might determine, as stated in his letter of January 3, 1918, and until the petitioners in their present brief have sought to minimize it, there has been no question but that it was a bona fide offer made by Powell with a view to bringing the negotiations to a conclusion and getting started on construction of the ships included in his proposal of December 19, 1917.

Powell's offer is a complete refutation of the factual situation presented in the petitioners' brief as the basis for the contention that the contracts were made under circumstances amounting to duress.

Moreover, even the circumstances outlined in the petitioners' brief do not furnish a basis for invalidating the contracts on the ground of duress. The cases cited by the petitioners do not bear out their contention. In none of the cases cited has a contract been invalidated either in law or in equity on the ground of duress, either legal, "moral" or economic, where the contract has been made between parties equally competent to contract and without any element of fraud, imposition or overreaching. The petitioners' contention is based on the assertion that the terms demanded by Bethlehem were knowingly harsh and excessive. But the Master found against this contention,

and held, as we have stated, that it was impossible at the time of the negotiations to make an accurate estimate of cost (F. 3, R. 681); that Bowles and Radford were as competent as Powell and Brown to estimate what future costs might be (R. 527, 538); that Brown's estimates were fairly and honestly made (F. 9, R. 683); and that the estimated base costs used in the contracts represented reasonable estimates of probable cost (F. 23, R. 688).

In affirming the petitioners' Request No. 140 (R. 624), to the effect that the Fleet Corporation was not in a position to determine the probable or approximate cost to Bethlehem of building the ships, the Master said:

> "Such cost was a guess for either Bethlehem or the Fleet Corporation."

And in affirming Request No. 165 (R. 634-5), to the effect that Bethlehem was not in a position to determine the probable approximate cost of troop ships under one of the contracts not here in controversy, the Master said:

> "Neither Bethlehem nor the Fleet Corporation were enabled to anticipate the future beyond the point of an educated guess."

In denying the petitioners' Request No. 106 (R. 614-5) to the effect that Powell and Brown were in a position to determine approximately what Bethlehem might reasonably expect to accomplish with respect to increasing efficiency of labor, the Master said:

> "Denied, because guessing against unascertainable future conditions is not the equivalent of 'reasonable expectation'."

Moreover, the Master found, concerning the six later contracts referred to in the petitioners' brief, that the representatives of the Fleet Corporation as a result of deliberate judgment fixed the "base cost" of the contracts at what was believed to be as fair and reasonable as could be estimated under all the then existing circumstances (R. 554). He also found that "The evidence also disclosed that the 'educated guess' of Powell and Brown as to the 'base cost' for the contracts of December 31, 1917, produced a still less cost to the Government of ships built under these contracts than under the lump sum or cost plus contracts with other shipbuilders" (R. 554). He also found:

> "The testimony in the record justifies the conclusion that with or without adjustment, to reflect the difference in specifications, the cost to the Government of the vessels built under the Bethlehem contracts was less, for value received, than the cost under contracts with other shipbuilders" (R. 568).

The Master's findings and rulings referred to above have been affirmed by both the courts below, and there is no evidence to the contrary. The assertion that the terms demanded by Bethlehem were known to be harsh and excessive, and that Bethlehem imposed such terms upon the Fleet Corporation by taking advantage of the urgency of its necessities is, therefore, without support in the record.*

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*That Bethlehem's representatives were convinced that the uncertainties of the times were such that they could not know what would be the outcome of the contracts that they proposed as to cost of construction and "savings" is shown by the fact that Powell declined to accept Bowles' offer to contract for the construction of certain ships at Union, covered by Contract No. 191 (R. 171), at $189 per ton, with wage protection (R. 979, 994-5, 1402-3), which would have

The cases cited in the petitioners' brief as supporting their contention that the contracts were tainted with duress are, with one exception, cases decided in admiralty with respect to salvage contracts. That courts of admiralty apply to such cases a rule not applicable to suits at law or in equity has been clearly pointed out by this Court. In *The Tornado,* 109 U. S. 110, one of the cases relied upon in the petitioners' brief, this Court said (p. 117), "Every agreement for salvage compensation is subject, as to amount, to the judgment of the court as to its being equitable and conformable to the merits of the case." In *The Elfrida,* 172 U. S. 186, also cited in the petitioners' brief, in upholding a salvage contract where there had been open bidding and there were no circumstances which had compelled the master of the libeled vessel to accept the offer of the libellants, this Court said (p. 197), "We do not say that to impugn a salvage contract such duress must be shown as would require a court of law to set aside an ordinary contract; but where no such circumstances exist as amount to a moral compulsion, the contract should not be held bad simply because the price agreed to be paid turned out to be much greater than the services were actually worth."

The contention in the petitioners' brief that the terms of the contracts in controversy were induced by duress is without support in the record either in fact or in law.

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resulted in a final price to the Fleet Corporation under a lump sum contract of $192 per ton, against $184 per ton (R. 996-7) to be paid by the Fleet Corporation under the form of contract and estimated costs now said by the petitioners to have been opposed to public policy. (See p. 73, *infra.*)

(b) *The contracts were not unconscionable.*

With respect to the alleged "unconscionability" of the contracts, the petitioners' whole argument is addressed to the amount of profit realized by Bethlehem thereunder. Nowhere do they assert that the contracts resulted in an excessive cost to the Fleet Corporation of any of the ships referred to. In none of the cases cited in the petitioners' brief has any contract been held to be unconscionable, unless the total amount to be paid under the contract was found to be unreasonable and either grossly exorbitant or totally inadequate, as the case might be, and the contract for that reason to be in the words of Lord Hardwicke in *Earl of Chesterfield* v. *Janssen*, 2 Ves. 125, 155,

> "such as no man in his senses and not under delusion would make on the one hand and as no honest or fair man would accept on the other."

Scott v. *United States*, 12 Wall. 443, from which petitioners quote at page 77 of their brief, is not in point. The services for the non-performance of which damages were sought in that case were held not to be within the contract. Petitioners' quotation from the opinion is nothing more than a restatement of the doctrine of *Earl of Chesterfield* v. *Janssen*, given as an additional reason why the plaintiffs' interpretation of the contract should not prevail.

Hume v. *United States*, 132 U. S. 406, is a leading case on unconscionable contracts, and well illustrates the class of contracts that will be held to be such. In that case the plaintiff contracted in writing to sell to the Government a quantity of shucks at 60 cents a pound at a time when the known or ascertainable market value of that commodity did

not exceed 1¾ cents per pound. As appears from the opinion, there was reason to believe that the bid was the result of a clerical error, and that the plaintiff intended to quote a price of 60 cents a hundredweight. The claimant, however, insisted that he did not so intend. After quoting Lord Hardwicke's classical definition of an unconscionable contract, this Court said (at p. 415):

> "The claimant by his replication insists that the price of sixty cents per pound for shucks 'was the price at which he intended to bid, and that there was no mistake on his part in making out the bid.' This is an admission, when taken with the findings of fact, that he designed to commit the agents of the Government to a contract 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other,' and is fatal to his recovery according to the contract."

In *Beard* v. *United States*, 3 Ct. Cl. 122, also cited in the petitioners' brief, the contract was for work to be fully performed within about 40 days after its execution at prices from 300% to 900% in excess of the usual and customary prices then current for similar work at a time and place "when laborers were plentiful, wages low, and material abundant and cheap". The court held that the price was so exorbitant as to be evidence of either imposition or collusion, which had not been overcome by the evidence before it.

Bassick v. *Aetna Explosives Company*, 246 Fed. 974, was a case in which a broker, having a contract to sell materials at a given price, persuaded his principal to alter his commission so that he would receive the entire pro-

ceeds above the specified price, at the same time concealing the fact that he had already sold, or was about to sell, the principal's goods at a price greatly exceeding the price named in the amended contract.

The other cases cited in petitioners' brief are equally irrelevant.

It is clear, however, from all those cases that whether or not a contract is to be deemed unconscionable is to be determined by the circumstances existing at the time of its making. Whether "a man in his senses and not under delusion" would at that time have made such a contract is dependent upon facts then known or ascertainable.

It is equally clear, in the present case, that the Fleet Corporation was quite aware of what it was doing when it entered into the contracts and agreed to the base prices therein contained. Its representatives were shipbuilders of long experience; they were engaged in the negotiation of contracts with every shipyard in the country; they knew what were the going prices of ships, how much they were being required to pay under the lump sum contracts, and what they could expect under straight cost-plus contracts. Before the first contracts with Bethlehem were signed they made comparisons which indicated that the base prices agreed upon with Bethlehem were reasonable (R. 1507-9; F. 22, R. 688).

The petitioners make a great deal out of the words of Admiral Bowles, in his memorandum of January 5, 1918, to the effect that he considered the prices too high, but that they were the best that he could get; and a picture is painted of Bethlehem's representative standing out for exorbitant prices. But the fact is that Admiral Bowles was endeavoring to get a lump sum quotation; that Powell would not

make such a quotation, because of the uncertainties of the time; and that, as it has turned out, Powell was entirely right in his view of the kind of contract that would best serve the interests of the Government as the owner of the Fleet Corporation, and Bowles was wrong. This may be seen by a comparison of Bowles's idea of price for a particular group of four cargo ships and the price which actually became payable for the same ships under a half-savings contract.

The Fleet Corporation had on August 3, 1917, requisitioned three cargo ships on which Bethlehem had commenced construction at the Union yards. Prior to the negotiations involved in this case, the then head of the Union yards had proposed a price of $205 per ton for the ships when completed (R. 994). In Bowles's discussions with Powell he offered $180, plus adjustment for wage increases (R. 979, 994-5, 1402-3), for those three and a fourth similar ship, while Powell stood out for a half-savings contract, with a base price of approximately $180 a ton. Had Bethlehem accepted Bowles's offer, it would have received, with the wage adjustments, $192 per ton for these ships. Actually, the cost to the Government under the half-savings contract was only $184 per ton (R. 996-7)—a saving of $8 per ton on 4 ships of approximately 12,000 tons each, or a total saving of approximately $380,000.

Moreover, whatever Bowles's view may have been, it is clear that Bowles's superior, Piez, regarded the form of contract adopted as more advantageous to the Fleet Corporation than either a lump sum contract or a straight cost-plus contract. He so testified (R. 1498-1502; see also Exh. B-6, R. 1901, offered, R. 1503, 1530). Piez, while not a shipbuilder, was a business executive of ability and

experience, and in his own business had made use of similar forms (R. 1500).

In any event, the form of the contracts which petitioners attack was believed by the parties to be desirable from the standpoint of both of them, and the Master and the courts below have found that it was (F. 12, R. 684; R. 736, 2330). The base costs specified in the contracts represented reasonable estimates of probable cost (F. 23, R. 688) and corresponded with the intention of the parties (F. 14, R. 685), and the contracts resulted in the construction of ships at a cost to the Fleet Corporation less than the cost of comparable ships built for it under either lump-sum or cost-plus contracts (R. 554-568).

The petitioners' contention that the contracts so entered into were unconscionable is contrary to all the evidence in this case, and to the findings of the courts below.

V

Petitioners' arguments amount to a contention that all bonus-for-savings contracts are invalid, and beyond the power of the Government to make. The contention is without basis in law.

Petitioners contend that the half-savings provisions of the contracts are invalid, first because they actually resulted in profits which petitioners consider unreasonably large, second because at the time when the contracts were made they "permitted" such unreasonable profits, and third because the profits, though resulting from substantial reductions below estimated costs, were not commensurate with the risk, or lack of risk, taken by the contractor under such type of contract.

That contention strikes at the root of half-savings contracts, and amounts to a request to this Court to declare such contracts invalid, as a matter of law, and beyond the power of the Government to make. For the essence of the contention is that the half-savings clause was invalid, because there was a possibility that the actual cost *might* fall below the estimated cost by reason of the non-occurrence of events or conditions which everyone considered probable at the beginning of 1918.

There is an essential absurdity in the petitioners' contentions, in so far as they are based upon the fact that the estimated costs, upon which the savings were to be computed, contained allowances for conditions which were expected to exist during the contract period. In ordinary times, when a contractor can bid for his materials in a relatively stable market, when wages are stable and no great expansion of working force is required, there is no need for such devices as half-savings contracts. The contractor can estimate his costs, add a figure for profit and for such contingencies as he may anticipate, and make his commitment on a firm basis.

It is under conditions such as existed in 1918 that occasion arises for entering into contracts other than lump sum contracts. The Government cannot get firm price commitments, except at figures which provide against all reasonably anticipated contingencies; it is better for it to agree to pay cost plus a profit; and it can protect itself against the pitfalls of straight cost-plus contracts by providing, through such devices as "half-savings" provisions, a liberal incentive to the contractor to keep the cost down.

In any such contract, it is in the nature of things that there must be some provision for changes and contingencies

that seem likely to occur, whether they be probable increases in the price of materials, an anticipated decrease in the efficiency of labor, which is necessarily present with a great expansion of the labor force, or such contingencies as higher costs arising from transportation difficulties, increased freight rates, or other economic factors.

In every such case there is always a *possibility* that some or all of the contingencies which are provided for may not occur. That being so, the argument of the petitioners at pages 57-60 of their brief amounts to a contention that all such contracts are invalid.

In view of the success of this type of contract in the particular case, from the standpoint of what the ships actually cost the Fleet Corporation, this Court might well hesitate to announce a rule which would condemn all such contracts, even if it were otherwise impelled to do so. In times of national emergency, the executive and administrative branches of the Government require the utmost freedom to contract, and to devise means of getting production quickly and cheaply; they will not be helped by arbitrary restrictions on the type of contracts which they may make —particularly by restrictions which are based upon a single case, and upon a conception that the profits derived by a particular contractor were in excess of reasonable compensation for the services performed.

In *Dayton Airplane Co.* v. *United States*, 21 F. (2d) 673, 674, *supra*, the Circuit Court of Appeals for the Sixth Circuit said:

> "In this class of contracts [i.e., contracts of the War Department for supplies], and for effect on future emergencies, if for no other reason, a sound public policy must require that the government

keep its contracts and stand by its settlements as an individual must."

VI

The petitioners are asking this Court to exercise a function of Congress in respect of the regulation of profits.

The petitioners are asking this Court to make a judicial declaration that profits of approximately 22% on the cost of ships (half being fixed fees and half being the contractor's share of savings) are, as a matter of law, exorbitant and unconscionable; to override contracts made by a governmental agency because, though that agency made the contracts with its eyes open and got what it bargained for, the amounts which the contractor earned thereunder have turned out to be more than this Court should consider reasonable. They are, moreover, asking this Court to set up a standard of compensation, or profit, in terms purely of a percentage of cost, without relation to any other economic factors.

We submit that petitioners are asking this Court to appropriate to the judicial branch of the Government a function which is legislative and executive in its essential character. We do not suggest that courts are not frequently called upon in particular cases, and upon evidence, to make a determination of reasonable compensation. What we do say, however, is that, having introduced no evidence whatever to establish any standard of reasonableness, the petitioners are asking this Court to refer to certain published reports of administration practice and, with that as the sole basis, to crystalize into a rule of law what is essentially a conception of legislative and administrative policy.

Not only is there no evidence to support the proposition that 22% of cost is an unreasonable and inordinate rate of return; but there is substantial evidence in the record which casts doubt upon such a proposition.

For example, Exhibit B-11 (R. 1907, offered, R. 1571) shows that the profits of a typical company (United States Steel Corporation) during the World War years were 49.1% in 1916, 57.6% in 1917, and 48.86% in 1918, the computation being based in each case upon gross sales. Similarly, Exhibit B-10 (R. 1906, offered, R. 1570) shows that, for typical peace time years 1926 and 1927, the rate of return of the various groups of industries in the United States, based on the ratio of profit to cost, varied from 12.77% to 56.15% for 1926 and from 9.75% to 52.98% for 1927, the combined averages for the two years being, respectively, 21.04% and 20.21%.

The petitioners' brief makes reference to a part taken by Charles M. Schwab in the modification by agreement of lump sum contracts that had been entered into with American Shipbuilding Company to a basis of cost plus 10%. We have shown by Geiss' testimony (R. 1540-69), which has not been controverted, that while the modified contract with American Shipbuilding Company purported to allow only 10% over cost, in point of fact, by reason of differences in the definition of cost and extra allowances, it figured considerably more than 10% on actual cost as defined in the Bethlehem contracts, and have demonstrated by his calculation (Exh. B-12, R. 1932, offered, R. 1540) that upon the same basis of settlement Bethlehem's claim would amount to something in excess of $8,000,000.

Mr. Schwab testified that what might be a proper margin of profit for American Shipbuilding Company

would not be adequate for an old line shipyard such as Bethlehem's because of the difference in the plant investment and the character of the ships constructed (R. 1481). Obviously the Master had a like distinction in mind in refusing petitioners Request No. 230 to the effect that 10% of cost was regarded as affording just and reasonable compensation (R. 662-3; see also Report, R. 539-40; also R. 2329).

The assertion is made in the petitioners' brief (p. 57), without any support in the evidence, but, as there stated, "without fear of contradiction", that a fee of 20 or 25% would be recognized as inordinate in a cost-plus contract. On the contrary we assert that there is no principle of law that would prohibit the Government from agreeing to payment of 20% of cost or more to obtain the expert services of an experienced organization to which it might assign its more difficult and exacting types of contracts (see Exh. B-28, R. 1920 offered, R. 1380), if it should be convinced that it would thereby attain its objective at a lower cost to it than if it contracted with others for the same construction on the basis of cost plus 10%. Under the contracts in controversy the Fleet Corporation got the ships at less cost than it paid for comparable ships built for it by other shipbuilders under both lump sum and cost-plus contracts (R. 554, 568).

In their petition for certiorari, the petitioners referred to the present national emergency and said:

> "The Government is now engaged in a program of military and naval armament comparable to or greater than that undertaken in 1917 and 1918. It is therefore, of immediate national concern that there should be an authoritative determination of the

extent to which the country's needs should place the Government at the mercy of its contractors".

Applied to the argument with respect to the amount of Bethlehem's profits on the contracts here in issue, this is a request to the Court to hold that the profits provided for in the contracts were unreasonable, and to fix 10% (subject, as the petitioners' brief says (p. 57), to "varying a small percentage from this standard") as the maximum that may be provided for, or permitted, under a Government contract.

In asking the Court to lay down such a rule, the petitioners are not only asking this Court to set up a legislative standard; they are asking it to set up such a standard in defiance of the rejection of that standard by the Legislature, and the adoption by the Legislature of another method of controlling the amount of profits during the present national emergency.

Congress from time to time has exercised its power to limit the profits of Government contractors in a variety of ways. It has limited the price which the Government might pay for specific commodities or facilities.* It has set up in certain instances a standard of "reasonable profit

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*Maximum of 53 cents per lb. for powder (Act of February 14, 1917, 39 Stat. 909); maximum of $2.45 per sq. ft. for unlined buildings and $2.90 per sq. ft. for lined buildings (Deficiency Appropriation Act of March 6, 1920, 41 Stat. 503); not more than 25% more than the estimated cost of the manufacture of similar material by the Government (Act of February 14, 1917, 39 Stat. 909; Act of July 8, 1918, 40 Stat. 815; Act of May 21, 1920, 41 Stat. 607); not more than the cost of the manufacture of similar article or material in a Government arsenal (Army Appropriation Act of July 11, 1919, 40 Stat. 104).

above the actual cost of manufacture".* It has limited the amount of recovery for profits under cancelled contracts.** It has delegated to the President the power to limit the margin of profit on essential commodities.***

Congress has limited the profits on naval vessels and merchant ships, since the World War, and has recently abandoned those limitations, after making many changes in them, and in their method of operation, during a continual re-examination of the problem over a period of six years.

Under the Vinson Act (March 27, 1934, 48 Stat. 505), profit on any contract for a naval vessel or naval aircraft was limited to 10% of the total contract price (which might be more than 11% of the contractor's cost), and all excess amounts were to be recaptured by the Government. By the Act of June 25, 1936 (49 Stat. 1926), the basis for computation of such profits was changed so as to apply, not to individual contracts, but to all contracts completed within an income taxable year. The Merchant Marine Act of 1936 (49 Stat. 1998) applied the same restrictions to merchant ships, and the Act of April 3, 1939 (53 Stat. 560) extended them to military aircraft, but at the same time increased the permissible percentage, for all aircraft, to 12% of the contract price (which might be more than 14% of cost).

The Vinson Act provided for profits, but took no account of losses. The Act of June 25, 1936, permitted a net loss on contracts in any taxable year to be carried for-

*Naval Appropriation Acts of August 29, 1916, 39 Stat. 556, and March 4, 1917, 39 Stat. 1168.

**War Claims Act of March 2, 1919, 40 Stat. 1272.

***Lever Act (August 10, 1917, 40 Stat. 276).

ward in determining profits for the following taxable year. The Act of April 3, 1939, further liberalized this provision so as to permit aircraft manufacturers to carry forward net losses for four succeeding income taxable years.

In 1940, because of the trend of international events, numerous bills were introduced into both houses of Congress, amending the Vinson Act in various particulars, and on June 28, 1940, the profit limitation of that Act was reduced to 8% (Ch. 440, 54 Stat. 676).

Within a few months, however, the policy of Congress was completely changed. On July 11, 1940, the Administration proposed to suspend the Vinson Act entirely, and to substitute therefor an excess profits tax law, applying to all industry.*

Pending the enactment of the excess profits tax law, the Act of June 28, 1940, was amended so as to strike out all reference to aircraft construction, thus restoring the 12% limitation contained in the Vinson Act (Act of Sept. 9, 1940, Ch. 717, 54 Stat. 872). The Report which accompanied the bill (H. R. No. 2810) explained the purpose of the Act as follows:

> "Unquestionably, there is a unanimity of opinion that all bottlenecks should be removed from the procurement of the most essential items of defense material, and airplanes stand at the top of materials in that category. Profit limitations do not now apply, public works contracts excluded, to any type of procurement of a military character, save complete naval vessels and aircraft No restriction obtains as to guns, powder, mechanized weapons, or any other kind of munitions. It would seem, therefore, that a limitation running to aircraft and naval vessels alone

*The New York Times, July 11, 1940.

> is not entirely logical, particularly at this time, and certainly is illogical if it operates to impede the consummation of urgent defense programs. The proper procedure, the committee submits, is to subject profits upon all contracts in the defense program, deemed to be excessive, to a uniform rate of recapture, and it wishes to stress the fact that delay in the early settlement of this question and the question of amortization of plant expansions are daily hurting the advance of defense preparation."

Finally, when Congress passed the excess profits tax law, it suspended the profits limitations of the Vinson Act and of the Act of June 28, 1940, during the period for which the excess profits tax should be in effect, and it also suspended the similar profit limitation in the Merchant Marine Act of 1936 (Act of Oct. 8, 1940; Ch. 757, 54 Stat. 974).

Thus the petitioners are asking this Court to re-enact, by judicial decree, a method of limiting contractors' profits which Congress tried out and has now abandoned.

Conclusion

The parties to the contracts in controversy considered the contracts to be more favorable to the petitioners than either lump sum or cost-plus contracts would have been. They proved to be so; since the cost to the petitioners of the ships constructed under them was, as the Master found, less than the cost of comparable ships constructed under either lump sum or cost-plus contracts in other yards. It was because Bethlehem did well the job that it undertook that that result was accomplished. In the light of the result it ill behooves the petitioners, after getting all that was con-

tracted for, to attempt to avoid payment on the pretext that Bethlehem was required, in order to recover on the contracts, to show by just what means that result had been accomplished. Without support in the record, the petitioners say that the result was not accomplished by increased efficiency. They seek to have the Court ignore the obvious consequence of their contention, namely, that, had Bethlehem been able to exercise still greater efficiency and further reduce the cost of construction, its earnings from the savings would have been greater and the petitioners' protest presumably the stronger, notwithstanding that they would have benefited to the extent of one-half of the saving.

The judgments of the court below should be affirmed.

Respectfully submitted,

FREDERICK H. WOOD,
ALFRED MCCORMACK,
Attorneys for Respondents.

HOYT A. MOORE,
WILLIAM W. ROBISON,
Of Counsel.

P. 2.

SUPREME COURT OF THE UNITED STATES.

Nos. 8 and 9.—October Term, 1941.

United States of America, Petitioner, vs. Bethlehem Steel Corporation, Bethlehem Shipbuilding Corporation, Ltd., Bethlehem Steel Company, Fore River Shipbuilding Corporation, Union Iron Works Company.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
United States Shipping Board Merchant Fleet Corporation, Petitioner, vs. Bethlehem Shipbuilding Corporation, Ltd.	

[February 16, 1942.]

Mr. Justice Black delivered the opinion of the Court.

These two cases arise from a dispute between Bethlehem Shipbuilding Corporation, Ltd., and the government about the amount of profits claimed by Bethlehem under thirteen war time contracts for building ships. The contracts were negotiated and executed in 1917 and 1918, when Germany's destructive warfare against our ocean shipping essential to the successful prosecution of the war made it necessary for the United States to build the greatest possible number of ships in the shortest possible time. They are typical products of a system of procurement heavily relied upon by the United States Shipping Board Emergency Fleet Corporation and other government purchasing agencies at the time.

On June 15, 1917, Congress gave to the President sweeping war powers, 40 Stat. 182, including (1) the power to commandeer shipbuilding plants and facilities, (2) the power to purchase ships at what he deemed a reasonable price with a provision for subsequent revision by the courts in the event the seller regarded the price set as unfair, and (3) the power to purchase or contract for the building of ships at prices to be established by negotiation. Acting under authority delegated to it by the President with Congressional approval, the Fleet Corporation declined to

seek utilization of the first and second methods but chose, under the third alternative, to make purchases through ordinary business bargaining.

The "actual cost" to Bethlehem of building the ships over which this dispute arises was about $109,000,000. The generously inclusive formula[1] for determining "actual cost," not challenged by the government here, was not peculiar to these contracts. It was based on the standard formula used by the Fleet Corporation in its contracts with other shipbuilders. And, as in practically all contracts of this type, there was no risk of loss.[2] The total profits claimed under the contracts by Bethlehem, and allowed by both courts below, were about $24,000,000,[3] or a little more than 22% of the computed

[1] Included in the detailed and comprehensive itemization of "actual cost" were the following and "items similar thereto in principle":

"The net costs . . . of labor (including compensation of labor by way of bonuses), and materials, machinery, equipment, and supplies . . . and other direct charges, such as insurance on the vessels, etc.

"A proper proportion of running expenses, including ordinary rentals, . . . repairs, and maintenance, light, heat, power, insurance, management, salaries (including compensation by way of bonuses), and other indirect charges . . . .

"A proper proportion of interest accrued . . . on bonds or other debts or loans existing or contracted for prior to the date of this contract and the proceeds of which shall be used, or shall have been or shall be invested in plant, equipment, etc., that shall be used, in the performance of the work under this contract.

"A proper proportion of taxes of all kinds accrued during the taxable year with respect to the business or property, except any Federal taxes.

"A proper proportion of physical losses actually sustained within the taxable year in connection with the construction of the vessels under this contract, including losses from fire, flood, storm, riot, vandalism, any acts of God, acts of war, or other casualties and not compensated for by insurance or otherwise.

"A reasonable allowance, according to the condition, for depreciation of values of the property and plant of the Contractor used in connection with the work under this Contract."

Neither in the contracts nor under any relevant statutory provision was there any restriction on salaries and bonuses to be paid to executives of the shipbuilder or its affiliates. Cf. Sections 505(c) and 804(c) of the Merchant Marine Act of 1936, 49 Stat. 1985, 1999, 2013.

[2] Even in the case of lump sum contracts with the government, it is generally recognized that the real risk of loss is negligible. It is usual in this kind of contract to set prices high enough to cover, or otherwise specifically to provide against, unforeseen contingencies. And where loss does occur contrary to the expectation of both parties, Congress often passes special bills making the contractors whole.

[3] These ships apparently cost the government at least a large part of still another $4,825,415. The government paid this amount to Bethlehem to aid in expansion of plant facilities to build the ships—facilities which were turned over to Bethlehem after the war. The government's money was contributed under a contract commonly in use whereby the contractor was given the option of purchasing the additional facilities at a depreciated value. Whether the government, upon conveyance of the property, received any compensation at all does not clearly appear.

cost.[4] This figure of $24,000,000 does not include such profits as may have been made by Bethlehem Steel Company, Bethlehem's parent, which sold it at the maximum prices established by the War Industries Board, 43,000 tons of steel used in these ships.[5] The percentage of profits in relation to the actual investment and working capital devoted by Bethlehem to the building of the ships was not found by either of the courts below.[6]

In No. 8, the government filed a bill in equity against Bethlehem and others. The bill alleged that the government had been induced to enter into the contracts by fraudulent representations of Bethlehem's agents; and as an independent ground for relief, that it had been the duty of Bethlehem to perform the contracts fairly, honestly, and economically "in the shortest practicable time" for no more than "a fair and reasonable profit" and that any provisions in the contract for payment of more are "void and unenforceable." The prayer was for an accounting and a decree requiring Bethlehem to refund all amounts previously paid to it by the government in excess of what the court should find to be just and reasonable compensation for building the ships. Bethlehem filed an answer and a counterclaim for damages based on alleged breach of contract by the Fleet Corporation.

In No. 9, Bethlehem brought suit at law against the Fleet Corporation claiming damages for breach of the same contracts. In an affidavit of defense and counterclaim the Fleet Corporation repeated the allegations made by the government in No. 8 and sought the same relief.

The two actions were jointly referred by the District Judge to a Master who held hearings and made findings. In No. 8, the Master

[4] While profits on individual contracts ranged above and below 22%, both in the proceedings below and in this Court the whole series of contracts was regarded as a unit. The government has made no separate argument with respect to the individual contracts in which more than the average profit was realized, nor has Bethlehem with respect to the contracts in which the amount due under the half-savings clause proved to be small. The only finding of the Master in which any separation of contracts is made shows that the profits realized on contracts in which the estimated costs were checked by the Fleet Corporation were higher than those on contracts in which the Fleet Corporation accepted Bethlehem's estimates without check.

[5] Compare the statutory method of restricting profits of affiliates embodied in Section 803 of the Merchant Marine Act of 1936, 49 Stat. 1985, 2012.

[6] The contracts contained a provision, usual in Fleet Corporation contracts, under which the government agreed "to provide the cash funds necessary to pay for work already done and materials already furnished and for carrying on the work under this contract."

recommended that the government's bill be dismissed, and on the authority of *Nassau Smelting Works* v. *United States*, 266 U. S. 101, further recommended that Bethlehem's counterclaim be dismissed for want of jurisdiction, the amount claimed being in excess of $10,000. In No. 9, he recommended that judgment be entered for Bethlehem for $5,272,075[7] with interest at 2% from September 1, 1922. The District Judge declined to allow any interest, applying the law of Pennsylvania as he thought our decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, required. In all other respects he followed the Master's recommendations and rendered judgment accordingly. 23 F. Supp. 676; 26 *id.* 259. The Circuit Court of Appeals affirmed. 113 F. 2d 301. On application of the United States and the Fleet Corporation, we granted certiorari. 311 U. S. 632.

As the case reaches us, the controversy revolves primarily around the section of the contracts which sets out what is to be paid to Bethlehem. In all the contracts, that section contains substantially the following provisions:

"The price to be paid for each vessel to be constructed and furnished in accordance with the terms of this contract . . . shall be the actual cost, plus the definite sum for profit hereinafter in this Article provided for, based upon an estimated base cost to the Contractor . . . . . Should the actual cost be less than the estimated . . . . cost. . . . the Contractor shall be allowed as profit on each vessel in addition to said fixed sum for profit . . . one-half the amount by which such actual cost of each vessel falls short of the estimated cost . . . ."

Thus, a high estimated cost would increase the probability of "savings" to be divided between Bethlehem and the government. And the more the estimated cost exceeded actual cost, the greater would be Bethlehem's share. It can be seen, therefore, that the estimated cost agreed upon by the parties is a pivotal figure.

I.

The government charged Bethlehem with fraud in submitting estimated cost figures which were adopted in the contracts. It was alleged that Bethlehem's agents made two false representations: (1) that it was impracticable to estimate closely what the cost would be and (2) that the estimates Bethlehem submitted, and which the Fleet

[7] The government concedes "that $1,514,995 of the judgment awarded . . . in the action at law is . . . due under contracts other than those now under attack."

Corporation accepted, were fair and reasonable under the circumstances. The Master found that there was no evidence to support this charge of fraud. The District Judge approved this finding as did the Circuit Court of Appeals which said that it had "carefully considered the record in the light of this contention [of fraud]" and concluded that "the estimates submitted by Bethlehem and prepared for it by its representative Brown were fairly and honestly made and as accurate as could be expected under the uncertain conditions then prevailing." And in this Court the petitioner accepts these findings. Therefore, in considering other attacks upon Bethlehem's right to recover, we must do so on the assumption that there was no fraud in Bethlehem's negotiations with the government.

II.

The government contends that even in the absence of fraud, Bethlehem is entitled to nothing by virtue of the half-savings clauses.

One argument is that the contracts gave Bethlehem the benefits of participating in the savings only if Bethlehem by special efforts increased its efficiency and brought actual costs below the estimates agreed to in the contracts.

Neither the specific language of the half-savings provision nor its context supports this contention. On its face, the provision contains an unconditional promise to pay Bethlehem one-half of the difference between the actual and estimated cost of the ships in question. That such a method of computation would tend to discourage careless expenditures and encourage vigorous attempts at realizing economies in building the ships is hardly debatable. But the half-savings clause does not impose any positive obligations upon the builder. The Master found, upon consideration both of the terms of the contracts and testimony on the understanding of the parties, that a showing of savings, without more, obligated the government to share them with Bethlehem. It cannot be maintained that this finding, accepted by both courts below, is without ample support.

Nothing in the negotiations between the parties as revealed in the record indicates that they had a contrary understanding of the contracts. Bethlehem held out against the Fleet Corporation's early insistence upon lump sum contracts. It continually asserted that uncertainties about final cost due to rapidly rising prices would require it to protect itself by insisting upon a figure too high for the Fleet

Corporation's acceptance and therefore itself proposed the cost-plus-fixed-fee-plus-half-savings method of determining compensation. While there seems to have been recognition that this method might induce greater efforts at efficiency which would be to the advantage of both parties, there is not the smallest hint that either Bethlehem or the government regarded the substitution of this method as imposing any positive obligations upon Bethlehem in addition to those it would have had under lump sum contracts.

In the alternative, the government urges that the half-savings clauses are severable, and that if the contracts imposed upon Bethlehem no obligation of special effort to effect savings, these clauses were unsupported by consideration, and are therefore unenforceable. The Master and the courts below, however, treated these clauses as non-severable; to do otherwise would call for departure from accepted principles of the law of contract. Whether a number of promises constitute one contract or more than one is to be determined by inquiring "whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out." Williston on Contracts (rev. ed.) § 863 and cases there cited. The record makes it clear that each of the contracts here was assented to as a single whole, and that consummation of a bargain between the parties depended upon inclusion of the half-savings clause. Furthermore, we know of no federal or state statute or established rule of law in any jurisdiction inconsistent with the elementary proposition that a promise to build ships is good consideration for a promise to pay a sum of money whether fixed in amount or depending upon the relationship between actual and estimated cost.[8] Cf. *Dayton Airplane Co.* v. *United States*, 21 F. 2d 673, 682-683.

III.

The government further argues that if the half-savings clauses must be taken as permitting Bethlehem to participate in savings however caused, the contracts are invalid because unconscionable. Without specifying that it relies on the law of any particular jurisdiction, the petitioner rests its argument on an asserted general

[8] Of the cases called to our attention by the government, only in Burke & James, Inc. v. United States, 63 Ct. Cl. 36, was a bonus for savings clause held severable and invalid although regarded as "part and parcel of the original . . . contract." We agree, as did both courts below, with the Master's statement that the Burke case is not applicable here because "the facts upon which the decision of that case was based are so different."

doctrine of unconscionability at common law. Since there is no governing constitutional or federal statutory provision, if these were contracts between private individuals, the law of some locality would be controlling. *Erie R. Co.* v. *Tompkins, supra.* Whether the same rule would apply to government contracts in general or to the contracts of the Fleet Corporation[9] in particular, we need not decide. Nor assuming the applicability of the *Tompkins* case to the contracts before us, would we have to determine whether the law of the District of Columbia or of some particular state is decisive. For in invoking the asserted doctrine of unconscionability claimed to be applicable here, the government relies entirely upon the alleged existence of two elements: duress and profits grossly in excess of customary standards. And for reasons we shall set out, neither of these two elements exists here.

Duress. The word duress implies feebleness on one side, overpowering strength on the other. Here it is suggested that feebleness is on the side of the government of the United States, overpowering strength on the side of a single private corporation. Although there are many cases in which an individual has claimed to be a victim of duress in dealings with government, *e. g., Union Pac. R. R. Co.* v. *Pub. Service Comm.*, 248 U. S. 67, this, so far as we know, is the first instance in which government has claimed to be a victim of duress in dealings with an individual.

The argument by which the petitioner seeks to establish that the contracts were made under duress is essentially this: Germany's submarine warfare made it imperative that the government secure the greatest possible number of ships in the shortest possible time; there was a scarcity of ships and shipbuilding facilities in the United States; Bethlehem, the largest shipbuilder in the world, not only had shipbuilding facilities available, but also a trained organization; at a time when Bethlehem's facilities and trained organization were vital to the prosecution of the war, it declined to accept terms proposed by the government but insisted upon prices which some of the government's representatives thought too high; although Congress had authorized the Executive to commandeer

[9] The District Court treated the contracts as governed by the law of Pennsylvania. The Circuit Court of Appeals treated them as governed by the law either of Pennsylvania or the District of Columbia, but did not decide which. The Fleet Corporation was organized under the laws of the District of Columbia. Although wholly owned and controlled by the government it has been held subject to suit either in state or federal courts. Sloan Shipyards v. U. S. Fleet Corp., 258 U. S. 549; Merchant Fleet Corp. v. Harwood, 281 U. S. 519.

shipbuilding facilities if necessary, Bethlehem's organization was also needed and the government was without power to compel performance by an unwilling organization; the government therefore had to accept contracts on whatever terms Bethlehem proposed or, doing without the ships which Bethlehem could produce, run the risk of military defeat.

Two basic propositions underlie this argument: (1) The government's representatives involuntarily accepted Bethlehem's terms. (2) The circumstances permitted the government no other alternative.

Upon reviewing the negotiations between the representatives of the government and the representatives of Bethlehem, we cannot find support for the first proposition. The Master found, and the courts below agreed, that "the contracts resulted from negotiations in which both parties were represented by intelligent, well informed and experienced officers whose sole object was to make the best trade possible, under conditions which included the uncertainties of war time contingencies, the results from which were not and could not have been known at the time the contracts were made." Two of the three principal negotiators for the Fleet Corporation have testified in the proceedings before the Master. It is abundantly clear from their testimony that, during the course of the negotiations, they did not consider themselves compelled to accept whatever terms the other side proposed. In the disposition of the two main differences between the negotiators there is no evidence of that state of overcome will which is the major premise of the petitioner's argument of duress. Cf. *French* v. *Shoemaker*, 14 Wall. 314, 332.

One of the differences was settled by the government's abandonment of its earlier insistence upon a lump sum arrangement together with a guaranteed date of delivery. In view of the rising prices and unpredictable labor supply of the time, Bethlehem's reluctance to enter into contracts on such terms does not seem unreasonable.[10] And if the government's abandonment of its position is to be regarded as evidence of compulsion, we should have to find compulsion in every contract in which one of the parties makes a concession to a demand, however reasonable, of the other side.

[10] Cf.: "Obviously no sane man would bid on a lump-sum contract under such conditions, unless perchance he should treat the matter as a pure gamble and include an excessive margin in his proposal for unforeseen contingencies." Report of Chief of Construction Division, War Department Annual Reports (1919) 4147.

The other major difference between the negotiators was on the matter of price. There is evidence that some of the Fleet Corporation's representatives considered Bethlehem's demands high, but we cannot conclude that the figure finally accepted by the Fleet Corporation was accepted because its representatives felt themselves powerless to refuse. On the contrary, Bethlehem by letter voluntarily offered to accept contracts on terms to be fixed by the Fleet Corporation's general manager. This offer was rejected, one of the Fleet Corporation's negotiators testifying that it preferred to make contracts rather than assume the attitude of dictating terms. Moreover, the general manager of the Fleet Corporation, in whom final authority was vested and who approved these contracts, was of the opinion that high estimated cost figures would be advantageous to the government because "care must be exercised that they be not placed at too low a figure, for if they are, the probabilities are that the contractor will lose interest in keeping the cost down." And one of the negotiators for the Fleet Corporation has given testimony that he was not so much concerned with cost as with speed of production since "legislation was already in the offing in the form of war profit taxes . . . to take care of extreme cases." We must therefore conclude that the negotiations do not show that Bethlehem forced the government's representatives to accept contracts against their will.

If the negotiations do not establish duress, the government finds it in the circumstances themselves. The petitioner concedes that the government could have commandeered Bethlehem's plants, but it contends that if the plants had been commandeered, Bethlehem's organization would have been unwilling to serve the government in them. Heavy reliance is placed on an observation in the Master's report that "the Government did not have power to compel performance by an unwilling organization." We shall later consider the alleged lack of power. We now point out that the alleged unwillingness is an assumption unsupported by findings or evidence. Since the possibility of commandeering appears not even to have been suggested to Bethlehem, we have no basis for knowing what its reaction would have been. We cannot assume that if the negotiations failed to produce contracts acceptable to both sides, Bethlehem would have refused to contribute to the war effort except under legal compulsion. We cannot lightly impute to Bethlehem's whole organization, composed as it was of hundreds of

people, such an attitude of unpatriotic recalcitrance in the face of national peril.

But even if we were to assume, as we do not, an initial attitude of unwillingness, we do not think that the government was entirely without means of overcoming it. For the representatives of the Fleet Corporation, an agent of the United States, came to Bethlehem armed with bargaining powers to which those of no ordinary private corporation can be compared. If it chose to, the Fleet Corporation could have foregone all negotiation over price, compelling Bethlehem to undertake the work at a price set by the President with the burden of going to court if it considered the compensation unreasonably low. And the power to commandeer Bethlehem's entire plant and facilities, in accordance with authority specifically delegated by the President, provided the Fleet Corporation with an alternative bargaining weapon difficult for any company to resist.

The government nevertheless urges that the circumstances here are analogous to those under which courts of admiralty have held contracts to be unenforceable. In particular, it points to the principle that courts of admiralty "will not tolerate the doctrine that a salvor can take advantage of a situation, and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit." *Post* v. *Jones*, 19 How. 150, 160. We think this principle has no real relevance to the case before us.

In the first place, if there was a "traffic of profit" here, it was not the unanticipated result of an accident as in the salvage cases. When Congress authorized the procurement of ships through ordinary commercial negotiations, it must have known that the purchases could not be made in a market of open competition because existing shipbuilding facilities would be overtaxed by the construction program. See Department of Commerce, Government Aid to Merchant Shipping (rev. ed. 1923) 433; Hearings before House Committee on the Merchant Marine and Fisheries on H. R. 10500, 64th Cong., 1st Sess., *passim*. And Congress must have anticipated that in the contracts agreed upon profits would be expected and that the self interest inherent in commercial transactions would make itself felt. Therefore, in seeking to establish duress from the circumstances in which these contracts were made, the government is relying on the identical circumstances which were in existence at the time Congress chose the policy of authorizing procurement of ships through commercial negotiation. We cannot now invalidate

contracts made pursuant to a congressionally selected policy on the sole ground of the coercive effect of circumstances which Congress clearly contemplated. To do so we should have to repudiate legislative power exercised in proper constitutional sphere.

In the second place, the captain of a ship in distress on the high seas who is completely at the mercy of his salvor cannot be likened to a sovereign power dealing with an individual contractor. We cannot regard the government of the United States at war as so powerless that it must seek the organization of a private corporation as a helpless suppliant. The Constitution grants to Congress power "to raise and support Armies", "to provide and maintain a Navy", and to make all laws necessary and proper to carry these powers into execution. Under this authority Congress can draft men for battle service. *Selective Draft Law Cases*, 245 U. S. 366. Its power to draft business organizations to support the fighting men who risk their lives can be no less.

Profits. The general common law rule of unconscionability on which the petitioner relies is said to deny enforcement to contracts when the profits provided for are grossly in excess of a standard established by common practice. Whether there is such a rule, what is its scope, and whether it is part of the body of law governing these contracts, we need not decide. For high as Bethlehem's 22% profit seems to us, we are compelled to admit that so far as the record or any other source of which we can take notice discloses, it is not grossly in excess of the standard established by common practice in the field in which Congress authorized the making of these contracts. And in particular, it may be added, the Master found that the ships built by Bethlehem cost the government less than comparable ships built by other shipbuilders. The government made no attempt to establish, nor is there any indication in the record, that the profits realized by other shipbuilders were any less than Bethlehem's.

To establish a standard of customary profits, the petitioner points to the experience of the Navy and War Departments and other branches of the government in connection with straight cost plus contracts. Because 10% was the profit specified in many such contracts, the government asserts that it is an appropriate figure here, and urges that the profits on these contracts, tested by such a standard cannot be allowed. The relevance of experience with cost plus contracts to the contracts here is not clear. The Shipping

Board deliberately chose to avoid cost plus contracts where possible, having found them unsatisfactory in practice. Moreover, the record shows that the total cost to the government of comparable ships under cost plus contracts was higher than the total cost of the ships Bethlehem built under the contracts here in question. And experience in many fields has demonstrated that the percentage of profit actually realized under cost plus contracts is likely to be far more than the percentage specified. As stated in 1918 by Charles E. Hughes, later Chief Justice, in his report to the Attorney General on the aircraft industry, "contracts of this sort lead to waste, foster abuses, and impose an almost intolerable burden of cost accounting, in itself a hindrance to rapid production." Report to the Attorney General on the Aircraft Inquiry (1918) 134. See also, Expenditures in the War Department—Camps, House Report No. 816, 66th Cong., 2d Sess., 49-53. The 10% which the petitioner derives by reference to the cost plus contracts of certain governmental department cannot be taken as a standard of common practice. It is an illusory figure without basis in the realities of business experience.

If profits earned under government contracts in general are taken as the standard of comparison the 22% claimed here is overshadowed in too many instances for it to be regarded as extraordinary. The Hughes report referred to above, for example, points out (pp. 136-146) that most of the airplane production during the last war was under contracts providing for much higher profits. To take an example of the profits made on food products, the Federal Trade Commission determined that in 1917, profits on the sales of salmon canneries, a major portion of whose output was purchased by the government, ranged from 15 to 68% of cost, averaging 52%.[11] Federal Trade Commission, Report on Canned Salmon (1918) 63. In the shipbuilding industry itself, even in peace times, profits were found by a special committee of the Senate which investigated the munitions industry to have been from 25% to 37% on the cruisers built in 1927, about 22% in 1929, and of like range for other years. Senate Report No. 944, 74th Cong., 1st Sess., 4.

If the comparison is made with industrial profits, not limited to profits on government contracts alone, the 22% asked for here

[11] The Federal Trade Commission Report does not give separate figures on sales to the government, but points out (p. 7) that the government had announced its intention to purchase 80% of the 1918 pack.

likewise loses all claim to distinction. An exhibit, the accuracy of which the government has not challenged, incorporated into the record of this case, indicates that in terms of profit on gross sales, the largest American steel company made 49, 58 and 46% during the years 1916, 1917, and 1918. As computed by the Federal Trade Commission, net earnings in 1917 of the same company on all its business were 25% of total investment, and the Commission cites instances of other steel companies whose earnings thus measured ranged from 30 to 320%. Federal Trade Commission, Letter on Profiteering (1918) 9. Profits of lumber producers, again in terms of return on investment, ranged as high as 121%; and of producers of petroleum products, as high as 122%, over half of the industry earning more than 20%. *Id.* 12, 13. During the first six months of 1917, one of the two major sulphur producers in the country sold its product at an average price of $18.11 per ton, more than 200% above cost which was $5.73 per ton; the other major producer earned 236% on its investment during the first eleven months of the same year. *Id.* 11. The Federal Trade Commission's collection of data for various other industries, a collection which the Commission stated was "by no means a complete catalog", affords many additional examples of the same kind. But further confirmation should be unnecessary for a conclusion no businessman would question: that the profits claimed here, seen in their commercial environment, cannot be considered exceptional.

The profits claimed here arise under contracts deliberately let by the Fleet Corporation under authority delegated by the President in accordance with an act of Congress. Neither Congress nor the President restricted the freedom of the Fleet Corporation to grant measures of profits common at the time. And the Fleet Corporation's chosen policy was to operate in a field where profits for services are demanded and expected. The futility of subjecting this choice of policy to judicial review is demonstrated by this case, coming to this Court as it does more than twenty years after the ships were completed. In any event, we believe the question of whether or not this policy was wise is outside our province to decide. Under our form of government we do not have the power to nullify it, as we believe we should necessarily be doing, were we to declare these contracts unenforceable on the ground that profits granted under Congressional authority were too high. The profits

made in these and other contracts entered into under the same system may justly arouse indignation. But indignation based on the notions of morality of this or any other court cannot be judicially transmuted into a principle of law of greater force than the expressed will of Congress.[12]

IV.

The problem of war profits is not new. In this country, every war we have engaged in has provided opportunities for profiteering and they have been too often scandalously seized. See Hearings before the House Committee on Military Affairs on H. R. 3 and H. R. 5293, 74th Cong., 1st Sess., 590-598. To meet this recurrent evil, Congress has at times taken various measures. It has authorized price fixing. It has placed a fixed limit on profits, or has recaptured high profits through taxation. It has expressly reserved for the government the right to cancel contracts after they have been made. Pursuant to Congressional authority, the government has requisitioned existing production facilities or itself built and operated new ones to provide needed war materials. It may be that one or some or all of these measures should be utilized more comprehensively, or that still other measures must be devised. But if the Executive is in need of additional laws by which to protect the nation against war profiteering, the Constitution has given to Congress, not to this Court, the power to make them.

Affirmed.

The CHIEF JUSTICE and Mr. Justice JACKSON, who as former Attorneys General actively participated in the prosecution of these cases, take no part in this decision. Mr. Justice ROBERTS also takes no part in the decision.

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12 Cf.: "It would be very dangerous, indeed, to the best interests of the government . . . if . . . this [Court] should . . . render decrees on the crude notions of the judges of what is or what would be morally right between the government and the individual." Smoot's Case, 15 Wall. 36, 45-46.

Mr. Justice MURPHY, concurring.

I concur in the opinion of the Court insofar as it relates to duress and coercion and the non-severability of the "bonus for savings" clauses, but desire to add a brief further statement of my views.

In voting for affirmance of the judgment, I do not wish to be understood as expressing approval of an arrangement like the one now under review, by which a company engaged in doing work for the Government in time of grave national peril—or any other time—is entitled to a profit of 22 per cent. under contracts involving little or no risk and grossing many millions of dollars. Such an arrangement not only is incompatible with sound principles of public management, but is injurious to public confidence and public morale. The fact that such cases were common during the last war, as evidenced by the circumstances recited in the opinion of the Court, provides no justification to my mind for such a practice then or now. No man or set of men should want to make excessive profits out of the travail of the nation at war, and government officials entrusted with contracting authority, and the Congress bestowing such authority, should be alert to prevent it.

The question before the Court for decision, however, is not whether an arrangement like the one presented for review accords with our conceptions of business morality or with correct administration of the public business. Having made a bargain, the Government should be held to it unless there are valid and appropriate reasons known to the law for relieving it from its obligations. It is the duty and responsibility of the courts, not to re-write contracts according to their own views of what is practical and fair, but to enforce them in accordance with the evidence and recognized principles of law.

In my opinion the elements of duress and coercion have not been established in this case. The doctrine that "necessitous men are not free men", a doctrine evolved by the English courts of chancery in the eighteenth century for the protection of harassed debtors,[1] is not applicable to the Government of the United States, armed as it is with both an actual and a potential arsenal of powers adequate to protect its interests in dealings with private persons.

I am also of opinion that the "bonus for savings" clauses are

[1] Vernon v. Bethell, 2 Eden 110, 113. And see Wood v. Abrey, 3 Maddock's Chan. 216; Underhill v. Horwood, 10 Ves. 209.

integral parts of the contracts in question and part of the entire consideration moving to Bethlehem in exchange for its promise to build ships. To characterize these clauses as severable and supported by consideration only if Bethlehem promised to increase its efficiency is ingenious, but requires us to close our eyes to the actualities of the record before us and to ignore fundamental contract law.

Nor can I accept the proposition that the "bonus for savings" clauses are properly interpreted as meaning that Bethlehem was to receive one-half of the "savings" only insofar as Bethlehem could prove that the "savings" were due to its increased efficiency. Such an interpretation, it is true, would prevent Bethlehem from benefitting by reason of purely fortuitous "savings". However, in the absence, as here, of fraud, mistake, or that overreaching which we label "duress" and "coercion", contracts should be interpreted as they are written, not as they might or should have been written in the light of after-thought and subsequent experience. The language of the "savings" clauses does not limit Bethlehem's participation in "savings" to those attributable only to its own efforts. The Master found that "Bethlehem was to participate in savings however earned". The suggested interpretation, ignoring the language of the contracts and the expressed understanding of the parties, gratuitously rewrites the contracts to accord with notions of fairness acquired in the light of subsequent developments.

It is understandable that one may be indignant at Bethlehem's claim, but such indignation does not justify the distortion of estabtablished legal principles to relieve the Government of its approval of a hard bargain. It cannot be left out of consideration that the Government entered into the agreements with full understanding of their terms. Surely there is much to be said in favor of the Government's standing behind obligations, even though quite onerous, which it incurred with knowledge of the circumstances. The possibility that the Government may be relieved of bargains twenty-four years after agreeing to them is not conducive to mutual trust and confidence between citizens and their government.

The judgment should be affirmed.

Mr. Justice FRANKFURTER, dissenting.

The Founders divided our government into three branches, partly to prevent autocratic concentration of power and partly to achieve appropriate division of labor in the difficult task of government. The President has his duties, the Congress its duties, and we ours. What powers the Congress should give the President in order to obtain the most effective production of war supplies, how the President should exercise those powers, whether a system of private contracts for war materials is conducive to unjustifiable waste and profiteering, or whether government production of necessary war supplies is a wiser course — these and like matters are not our business and upon them we should neither express nor intimate views. However circumscribed the judicial area may be, we had best remain within it. But the function of the judiciary is not so limited that it must sanction the use of the federal courts as instruments of injustice in disregard of moral and equitable principles which have been part of the law for centuries. I am compelled, therefore, to dissent from the judgment of the Court.

In the summer of 1917 the United States was at war with Germany. The enemy's submarine was taking terrific toll of our shipping. The immediate threat to our national security had to be met promptly. Congress enacted the Emergency Shipping Fund Act of June 15, 1917, 40 Stat. 182, conferring vast powers upon the President. He was authorized to place orders for such ships or material as "the necessities of the Government" may require; to modify, suspend, cancel or requisition contracts for the building, production, or purchase of ships or material; and to take over any plants and ships constructed or in the process of construction. If any person owning any ship, plant, or material refused to build or sell ships or material ordered by the Government "at such reasonable price as shall be determined by the President", he was empowered to take possession of the ships, material, or plant of such person.

On July 11, 1917, the President delegated all the authority vested in him by this Act to the United States Shipping Board Emergency Fleet Corporation. A stupendous task was thereby imposed upon the Fleet Corporation. "The program of construction, as well as operation was gigantic. It involved an expenditure of more than three and a half billion dollars, a sum greater than any expended

by any corporation in a similar period of time. Many of the officials and board members were without experience in either shipbuilding or operation. No adequate organization existed at the beginning. A complete organization to carry out its large program had to be created. There was a shortage of shipbuilding skill as well as shipbuilding facilities. The need for ships was imperative and constantly increased during the combat period." Report of the Select Committee on U. S. Shipping Board Operations, H. Rep. No. 1399, 66th Cong., 3d Sess., p. 24.

Bethlehem was the largest shipbuilding company in the world. Its five subsidiaries and their plants were experienced shipbuilders, with efficient and well-equipped organizations. As the Master in this case found, "it was understood by all parties concerned that the Fleet Corporation shipbuilding program would call for capacity production at each of Bethlehem's shipyards". Of course the Government had the power to take over Bethlehem's shipyards and plants. But the United States was at war. It needed ships—and it needed them at once. The shipyards and plants of a recalcitrant shipbuilder would not produce the necessary tonnage, at least not in the needed time, without an organization able to operate them at maximum efficiency. The Master found that "A failure to induce Bethlehem to undertake the shipbuilding program covered by these contracts, followed by the taking possession by the Fleet Corporation of the Bethlehem plants, could not have accomplished the desired result. It was Bethlehem's organization that was necessary to insure success to the shipbuilding program of the Fleet Corporation and, as the Government did not have the power to compel performance by an unwilling organization, if Bethlehem demanded its price on the basis of substantial commercial profits rather than contribute such services on a patriotic basis, the Government was obliged to take the contracts on such basis or not at all."

Bethlehem does not deny that in these negotiations the Government's legal power to requisition its shipyards was, for purposes of bargaining, an empty weapon. "It is also true", Bethlehem admits, "that, although the Fleet Corporation had the power to take over Bethlehem's yards, what it really required for the carrying out of its program was the use of Bethlehem's organization—its knowledge of how to build ships." The representatives of both Bethlehem and the Fleet Corporation knew that the Government

did not regard its power to requisition plants and shipyards as a satisfactory alternative to making contracts with private shipbuilders for the construction of ships.[1] It is not for us to say that the Government should not have determined upon such a policy. It is enough that when these contracts were made, none of the parties believed that there was open to the Government the feasible alternative which now, twenty-five years later, this Court says was open to it.

This was the setting in which the contracts in suit were made. Bethlehem was represented throughout the negotiations by Joseph W. Powell, its vice president and operating manager, and Harry Brown, its technical manager, described by the Master as "two of the ablest and most experienced shipbuilders and estimators of shipbuilding costs in the United States". On behalf of the Fleet Corporation the active negotiators were Admiral E. T. Bowles, manager of its division of steel ship construction, and G. S. Radford, manager of its contract division. The Master characterized Bowles and Radford as "equally competent shipbuilding experts". However, they were not empowered to conclude contracts on behalf of the Fleet Corporation. That ultimate authority belonged to Charles Piez, the vice-president and general manager of the Fleet Corporation. Piez was a business man who had had no previous shipbuilding experience, and the Master found that "At the time of the negotiations relating to the contracts in controversy, the relations between Powell and Piez were very close. Piez, as Powell knew, had had no shipbuilding experience whatsoever, had implicit confidence in Powell's integrity and shipbuilding ability and experience, and was accustomed to look to him for information and assistance with respect to matters of shipbuilding."

[1] Whatever the scope and importance of the Government's requisitioning power in other situations (compare Baruch, American Industry in War, p. 77, with Sen. Rep. No. 944, 74th Cong., 1st Sess., pt. 2, pp. 4-5, 111-15), it was without significance in the Fleet Corporation's shipbuilding program. The reports of the Shipping Board show that the exercise of the power was limited to the acquisition of vessels which had been built or were being constructed; the power does not seem to have been employed to take over the shipyards of recalcitrant private contractors. Indeed, the policy of the Government, based upon its wartime needs, was to encourage, financially and otherwise, the construction and maintenance of shipyards by private interests. See 1st Annual Report of the U. S. Shipping Board (1917) pp. 12-15; 2d Annual Report (1918) pp. 33-36, 120-22; Report of Director General Charles Piez to the Board of Trustees of the U. S. Shipping Board Emergency Fleet Corporation (April 30, 1919) pp. 13-14, 78, 123; Report of the President of the U. S. Shipping Board Emergency Fleet Corporation to the Board of Trustees (August 1, 1919) pp. 25-26.

Following a conference in Washington on June 15, 1917, attended by Powell and other shipbuilders, the General Manager of the Fleet Corporation requested Bethlehem to submit formal proposals for the construction of ships. Throughout the entire negotiations which followed, the Fleet Corporation tried to persuade Bethlehem to enter into "lump-sum" contracts. Powell refused, insisting upon the so-called "half-savings" form of contract which he had originated. He set forth his proposals in his letter of December 13, 1917, to the Fleet Corporation: "Because of the unprecedented conditions surrounding the Labor and Material market, it is impracticable to estimate within a reasonable percentage what will be the actual cost of construction, and it is therefore impossible to submit fixed prices for any of these vessels, except upon a basis so far above estimated cost that any figure acceptable to this Company would not be acceptable to the Emergency Fleet Corporation. It is proposed, however, that they be constructed on the basis of actual cost plus a fee, with an agreed upon probable cost, this Company to be paid in addition to the fee one-half of any saving that may be made below this cost figure, and with the further provision that the estimated cost figure will be increased due to any increase in rates of wages that may be approved by the Emergency Fleet Corporation."

After further conferences, Powell submitted a proposal, dated December 19, 1917, specifying the estimated costs and fixed fees of the vessels to be constructed. On the morning of January 3, 1918, before the Fleet Corporation had expressed any views on the proposal of December 19, Powell handed Piez a letter, dated January 3, 1918, offering to construct a greater number of vessels than was specified in his earlier proposal. The letter concluded "that while this company cannot undertake any capital expenditures at its expense, if the terms in our proposal do not otherwise meet with the Emergency Fleet Corporation's approval, we are prepared to accept the order to construct these vessels on such terms as may be personally determined by Mr. Charles Piez, the Vice President and General Manager, and strongly urge there be no delay in placing this order, as we are making this offer because of our knowledge of the vital emergency now confronting this nation in connection with the requirements for additional merchant vessels."

Upon receipt of this letter, Piez arranged a conference between Powell, Brown, Bowles, and Radford, which occurred on the afternoon of January 3. But Bowles and Radford did not know, and

neither was informed before or during the conference, of the offer made to Piez in Powell's letter of January 3. It can hardly be said, therefore, that this letter, neither addressed to nor made known to the real negotiators for the Government, was a factor in their negotiations.

At the conference, which lasted about five hours, Bowles again attempted to persuade Powell to undertake the construction upon a lump-sum basis. Powell was adamant, however, and Bowles had to acquiesce in the half-savings form of contract in order to reach any agreement. Powell insisted that the estimates previously submitted by Bethlehem were fair and reasonable. Neither Bowles nor Radford submitted any estimates or counter-proposals, "their criticism being limited to the opinion expressed by Bowles that the original and reduced estimates submitted by Powell were too high". Powell made several reductions in the estimates, and in response to Bowles' inquiry, Brown assured him that the estimates were about as accurate as could be made under the circumstances. Bowles and Radford thereupon agreed to the prices, subject to confirmation by Piez. On the same day they handed Piez the following memorandum:

"We hand you herewith the Bethlehem Shipbuilding Corporation's proposal dated December 19, for additional construction at their various plants, amounting in all to 19 vessels, exclusive of tugs. It may be noted that, with the exception of three ships, the vessels in question are troop ships and tankers—ships of a type that only real shipbuilders can produce satisfactorily. As is well known, we have been having difficulty in placing such vessels.

"We wish to place on record the fact that the Bethlehem Shipbuilding Corporation's representatives have insisted on comparatively high prices for these vessels; that they have only with difficulty been persuaded to quote us on the types of ships referred to; and, that their attitude has been characterized by an arbitrary refusal to guarantee or stand behind delivery dates. In other words, it was difficult to persuade them to quote even a tentative delivery date, and they refused positively to accede to a bonus and penalty clause for delivery.

"The letter herewith, addressed to the Bethlehem Shipbuilding Corporation, in reply to their proposal, has been prepared for your signature and is now presented with the recommendation that it be signed. While the prices we have agreed to, with representatives of the Bethlehem Shipbuilding Corporation, are not satisfactory to us, nevertheless, they represent a material reduction from the prices quoted by that Corporation. Realizing that the

Nation will need these vessels we have been actuated by the belief that further delay in placing the contracts should be eliminated and we believe we have made the best compromise possible under very difficult conditions."

As a consequence of these negotiations, the thirteen contracts here in controversy were executed, seven on February 1, 1918, and six thereafter.

The provisions of these contracts demand careful analysis. The contract marked No. 183, calling for the construction by Bethlehem of three steel tank vessels each weighing about 9,100 tons, is typical.

In order to provide the sums necessary for carrying on the work under the contract, the Fleet Corporation agreed to deposit in advance "such sums as may be necessary to constitute and keep constituted a fund from which to finance the work, to provide for payments to be made for materials, and for wages and salaries of persons employed upon the work hereunder." The Fleet Corporation agreed also to assist Bethlehem "to secure with the utmost practicable expedition and at the minimum cost consistent with the existing conditions, the facilities, utilities, parts, materials and supplies required for the work under this contract". The price to be paid for each vessel was defined to include (a) the "actual cost"; plus (b) a fixed fee of $185,000, plus (c) one-half the amount by which the actual cost of each vessel should fall short of an estimated cost of $1,865,000.

It would be difficult to draft a more inclusive definition of "cost" than that contained in this contract. "Actual cost" was defined to include the following items, as well as "items similar thereto in principle": (a) the net costs of labor (including bonuses), materials, machinery, equipment, and supplies furnished by Bethlehem, and all other direct charges, such as insurance on the vessels, etc.; (b) a "proper proportion" of running expenses, including rentals, cost of repairs and maintenance, light, heat, power, insurance, management, salaries (including bonuses), and all other indirect charges; (c) a "proper proportion" of interest accrued on bonds, loans, or other debts existing or previously made, the proceeds of which "shall be used, or shall have been or shall be invested in plant, equipment, etc., that shall be used," in the performance of the contract; (d) a "proper proportion" of taxes of all kinds, except federal taxes, with respect to the business or property; (e) a "proper proportion" of physical losses sustained in connection

with the construction of the vessels under the contract, including losses from fire, flood, storm, riot, vandalism, acts of God, acts of war, or other casualties; and (f) a "reasonable" allowance for depreciation of property and plants used in connection with the construction under the contract.

The Master found that under the "half-savings" clause Bethlehem was entitled to receive one-half the difference between the estimated cost and the actual cost, regardless of how this difference was achieved. Bethlehem was therefore not required to show that the "savings" were attributable to its efforts to increase efficiency.

Since the estimated costs of construction specified in the contracts are crucial in fixing the extent of Bethlehem's profits, it is necessary to consider how they were determined. According to the explanation furnished by Bethlehem, Brown prepared the estimated costs specified in Bethlehem's letter of December 19, 1917, as follows: As the basis of his estimate he took the cost of constructing Hull 253, a 9,100 ton tanker which had recently been completed at the Fore River yard. The cost of the material in Hull 253 was about $389,000, consisting of $150,000 for the steel structure and $239,000 for the remaining material. Brown estimated that the cost of the material in a similar tanker to be constructed in 1918 would be $817,000, including $399,000 for the steel structure and $418,000 for the remainder. His estimate assumed an increase in freight rates and costs of delivery of 42%. The next item was the cost of labor, which on Hull 253 amounted to 38.75 cents per hour. Brown assumed that wage scales would rise to 50 cents per hour, an increase of 29%, and that efficiency would decrease about 30%. Therefore, he estimated a total labor cost of $548,000, as compared with the actual labor cost upon Hull 253 of $326,000. Similarly, the estimates of plant operating expenses were computed on the basis of equally large assumed increases. The total estimated cost of material, labor, operating expenses, and overhead amounted to $1,694,000, to which Brown added a flat 10% allowance to cover items such as armed guard equipment and "to make allowance for other contingencies", making a total estimated cost of $1,863,000, or approximately $205 per ton. To this figure Powell added an additional $10 per ton because, as he testified, "there was an item of increased cost of steel, which represented a contract for

very high-priced steel that we had to use in connection with this program, and which amounted to about $2.50 a ton spread over the program that we expected to undertake. That was a very rough figure. Whatever else I put on I put on because I knew I was going to have to trade the final contract out with Admiral Bowles and I knew I would not get what I asked for, and if I did not ask for more than I expected I would not get out where I wanted to be." Brown testified that "He [Powell] took the figures that I gave him and added $10 a ton to it" for some reason which he could not recall.

The estimated cost finally specified in the contract for the construction of the three vessels was $1,865,000; the estimated cost of such vessels proposed in Powell's letter of December 19, 1917, was $1,983,800, a difference of $118,800, or less than 6% of the proposed estimate.

The Master found that during the negotiations the Fleet Corporation was uninformed as to the probable cost of materials and labor, Bethlehem's overhead and operating expenses, and depreciation and similar charges. Consequently, at the conference of January 3, 1918, from which emerged the contracts in controversy, the representatives of the Fleet Corporation did not submit any counter-offers to Bethlehem; they merely insisted that Bethlehem's estimates were too high. Brown's testimony is illuminating as to the nature of the bargaining at the conference:

"Q. Now I am asking you whether with respect to these vessels Admiral Bowles submitted any price of his own?

"A. No, sir.

"Q. Did he ask you how your estimates were made up?

"A. No, sir.

"Q. Did he ask you to justify your estimates in any way?

"A. No, sir.

"Q. He just objected to them repeatedly and said they were too high?

"A. Yes, sir.

"Q. But did not ask you to justify them?

"A. No, sir.

"Q. Until Powell finally came down to a figure which Bowles was willing to accept?

"A. Well, I should put it this way; to a figure which Mr. Powell refused to go below."

The total estimated costs of construction in the thirteen contracts in controversy amounted to $119,750,000. The total actual costs,

as defined in the contracts, were $92,990,521. The estimated costs therefore exceeded the actual costs by $26,759,479, or, to put it another way, the estimated costs were almost 29% greater than actual costs. Nowhere in the long record, as the Master found, is there any explanation or justification for the tremendous disparity between the estimated costs submitted by Bethlehem, or those specified in the contracts, and the actual costs.

Bethlehem's profits under these contracts amount to approximately $24,000,000, or about 22% of actual costs including extra work. In two of these contracts, Nos. 191 and 226, its profits exceed 34% and 32%, respectively. Moreover these figures do not include the profits made by Bethlehem Steel Company, an affiliate, on the sales to Bethlehem at the maximum prices permitted by the War Industries Board of 43,000 tons of steel used in the construction of ships under these contracts.

To speak of Bethlehem's profits as only 22% is in any event misleading. The profits are 22% of "cost", and not 22% of what might fairly be described as Bethlehem's capital investment in these contracts. For under these contracts Bethlehem took absolutely no risk of loss; in addition, the Government agreed to advance all sums necessary to finance the construction of the vessels. Even in usurious transactions the lender takes the risk of the borrower's insolvency. Here Bethlehem took no risks at all.

Bethlehem has already received from the Government the total costs of construction (including items for wage increases and extra work), plus fixed profits of $11,962,400 (representing about 11% of the actual costs including extra charges), plus bonuses of $8,093,157 under the half-savings clause (over 7% of costs). It has thus received total profits of more than $20,000,000 under these contracts. In the present suits it is seeking additional sums of more than $7,500,000, of which about $3,800,000 represents bonuses under the contracts in question. In sustaining the judgments of the lower courts, this Court is awarding Bethlehem further profits of about 4% on these contracts.

The Master expressly found that it was essential that Bethlehem undertake to build the vessels provided for in the contracts, and that since the Government needed Bethlehem's organization, it had no satisfactory alternative. It had to make the contracts on Bethlehem's terms or not at all. He concluded, nevertheless, that since "the Fleet Corporation made the contracts with open eyes, al-

though resenting the commercial attitude of Bethlehem and condemning Bethlehem for demanding its 'pound of flesh' ", the contracts were enforceable by Bethlehem in the absence of any proof of fraud.

The District Court concurred in the proposition that the absence of fraud made the contracts invulnerable. But its conclusion is contradicted by its findings: "The managers for the contractor adopted the famous Rob Roy distinction who admitted he was a robber but proudly proclaimed that he was no thief. The contractor boldly and openly fixed the figures in the estimated cost so high as to give them the promise of large bonus profits. The managers for the Fleet Corporation knew that the estimate was high and why it was made high and so protested it. The reply of the contractor's managers was, 'We will take the contract with this promise of bonus profits incorporated in it but not otherwise. You take it or leave it'. Whatever wrong there was in this, may have been the wrong in a daylight robbery but there was no element of deception in it." 23 F. Supp. 676, 679.

Similarly, the affirmance of the Circuit Court of Appeals appears to have been based upon the assumption that the government's failure to show fraud was fatal: "It is of course obvious that these negotiations took place in time of war when the need of the Government for ships was extremely urgent and the necessity of reaching an agreement with Bethlehem, therefore, vital. It is equally clear that Bethlehem insisted upon assuring itself a margin of profit which in view of the necessities of the Government was so large as to indicate an attitude of commercial greed but little diluted with patriotic feeling. There is no doubt that this attitude on the part of Bethlehem was deeply resented by the Government representatives but the latter were faced with the alternative of either agreeing to Bethlehem's terms or taking possession of its shipyards and having the Government itself construct the vessels. We think the record clearly indicates that the Government representatives felt that the latter course could not have accomplished the shipbuilding program with the speed which was essential. It was Bethlehem's existing shipbuilding organization that was necessary to insure success to the program of the Fleet Corporation. Consequently the Government representatives, feeling as they did that Bethlehem's organization was necessary to their program, were obliged to accept the terms offered by Bethle-

hem. This they did with full knowledge, as we have said, that the estimated cost figures included in the contracts did not represent close approximations but were so prepared as to assure to Bethlehem substantial additional profits by way of the bonus for savings. It follows that while Bethlehem may be condemned for having taken advantage of the Nation's necessities to secure inordinate profits it cannot be charged with having misrepresented the facts to the Government's representatives." 113 F. 2d 301, 305-06.

Thus, not less than six times did the Circuit Court of Appeals declare that the unconscionable terms of this contract were forced upon the Government by the dire necessities of national self-preservation. Nevertheless the Court found itself impotent to resist the demand that the courts themselves become the means of realizing these "inordinate profits". But law does not subject courts to such impotence. Courts need not be the agents of a wrong that offends their conscience if they heed the commands of law.

In England prior to 1285 (Statute of Westminster II, 13 Edw. I, c. 50) suitors were frequently "obliged to depart from the Chancery without getting writs, because there are none which will exactly fit their cases, although these cases fall within admitted principles." Maitland, Forms of Action at Common Law, Lect. IV (1936 ed.) p. 51. Today it is held that because the circumstances of this case cannot be fitted into a neatly carved pigeonhole in the law of contracts, "daylight robbery", exploitation of the "necessities" of the country at war, must be consummated by this Court. It is said that familiar principles would be outraged if Bethlehem were denied recovery on these contracts. But is there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice? Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other?

These principles are not foreign to the law of contracts. Fraud and physical duress are not the only grounds upon which courts refuse to enforce contracts. The law is not so primitive that it sanctions every injustice except brute force and downright fraud. More specifically, the courts generally refuse to lend themselves to the en-

forcement of a "bargain" in which one party has unjustly taken advantage of the economic necessities of the other. "And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them." *Vernon* v. *Bethell*, 2 Eden 110, 113. So wrote Lord Chancellor Northington in 1761.

The fact that the representatives of the Government entered into the contracts "with their eyes wide open" does not mean that they were not acting under compulsion. "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." Holmes, J., in *Union Pac. R. R. Co.* v. *Pub. Serv. Comm.*, 248 U. S. 67, 70. In that case a state unconstitutionally exacted a fee for a certificate of authority to issue railroad bonds. A railroad which had paid the fee and obtained a certificate, rather than run the risk of subsequent invalidation of its bonds and imposition of serious penalties, was held to have been coerced into making the payments. In *Swift Company* v. *United States*, 111 U. S. 22, 29, the taxpayer's only alternatives were "to submit to an illegal exaction, or discontinue its business". The payment of the tax in these circumstances was held to be under duress. See also *Ward* v. *Love County*, 253 U. S. 17, 23. The courts generally regard the dilemma of the taxpayer who must either pay the taxes or incur serious business losses as a species of duress. E. g.; *Morgan* v. *Palmer*, 2 Barn. & C. 729; *Ripley* v. *Gelston*, 9 Johns. 201; *Scottish U. & N. Ins. Co.* v. *Herriott*, 109 Iowa 606; see Notes, 64 A. L. R. 9, 84 A. L. R. 294.

Underlying all these cases is the law's recognition of a basic psychological truth. In *Atkinson* v. *Denby*, 7 Hurlst. & N. 934, 936, Cockburn, C. J., said that "Where the one person can dictate, and the other has no alternative but to submit, it is coercion". See also Abbott, C. J., in *Morgan* v. *Palmer*, 2 Barn. & C. 729, 735: "But if one party has the power of saying to the other, 'that which you require shall not be done except upon the conditions which I choose to impose,' no person can contend that they stand upon anything like an equal footing." And these were decisions in days when law was supposed to be much more rigid and more respectful of forms than we now ordinarily deem just.

The fundamental principle of law that the courts will not enforce a bargain where one party has unconscionably taken advantage of the necessities and distress of the other has found expression in an almost infinite variety of cases. See *Lonergan* v. *Buford*, 148 U. S. 581, 589-91; *Snyder* v. *Rosenbaum*, 215 U. S. U. S. 261, 265-66. Perhaps the most familiar is the situation of the mortgagor who under the pressure of financial distress conveys his equity of redemption to the mortgagee. The courts will scrutinize the transaction very carefully, *Villa* v. *Rodriguez*, 12 Wall. 323, 339, and if it appears that the mortgagee has taken unfair advantage of the other's position, the conveyance will not be enforced. Compare *Vernon* v. *Bethell*, 2 Eden 110; *Close* v. *Phipps*, 7 M. & G. 586; *Richardson* v. *Barrick*, 16 Iowa 407.

Similarly, an heir or remainderman who is compelled by financial circumstances to sell his expectancy for a song may recover it if the vendee has unduly exploited the other's distress. *Wood* v. *Abrey*, 3 Maddock's Chan. 216, 219 (where the Vice-Chancellor, Sir John Leach, said: "If a man who meets his purchaser on equal terms, negligently sells his estate at an under value, he has no title to relief in equity. But a Court of Equity will inquire whether the parties really did meet on equal terms; and if it be found that the vendor was in distressed circumstances, and that advantage was taken of that distress, it will avoid the contract."); *Underhill* v. *Harwood*, 10 Ves. Jr. 209, *M'Kinney* v. *Pinckard*, 29 Va. 149; *Butler* v. *Duncan*, 47 Mich. 94; *Brown* v. *Hall*, 14 R. I. 249. In *Administrators of Hough* v. *Hunt*, 2 Ohio 495, 502, a person heavily in debt, in order to obtain a further loan with which to meet debts falling due, agreed to buy land at more than double its value. The court found that the lender had unjustly taken advantage of the borrower's necessities and therefore rescinded the contract: "The rule in chancery is well established. When a person is incumbered with debts, and that fact is known to a person with whom he contracts, who avails himself of it to exact an unconscionable bargain, equity will relieve upon account of the advantage and hardship." This was written in 1826. To the same effect are *Vyne* v. *Glenn*, 41 Mich. 112, and *Bither* v. *Packard*, 115 Maine 306.

Another class of cases in which this principle has been applied arises where a customer of a gas or electric company pays charges which he asserts he is not obligated to pay, rather than have his

service disconnected. Payments made in such circumstances are regarded as coerced. See *Boston* v. *Edison Electric Illuminating Co.*, 242 Mass. 305, 310; *Westlake & Button* v. *St. Louis*, 77 Mo. 47; Note, 34 A. L. R. 185.

Cobb v. *Charter*, 32 Conn. 358, illustrates another type of controversy in which the courts have given effect to the historic principle of duress which is now seemingly rejected as an innovation. The defendant there had possession of a chest of tools belonging to the plaintiff, a mechanic. He refused to give up the chest, which the plaintiff needed in order to ply his trade, unless the latter would pay a bill for which he denied responsibility. The plaintiff's payment of the bill in these circumstances was held to have been made under duress. Accord: *Lonergan* v. *Buford*; 148 U. S. 581, 589-91; *Fenwick Shipping Co.* v. *Clarke Bros.*, 133 Ga. 43; *Stenton* v. *Jerome*, 54 N. Y. 480; *Harmony* v. *Bingham*, 12 N. Y. 99.

In *Stiefler* v. *McCullough*, 97 Ind. App. 123, a merchant who had to obtain a loan in order to remain in business agreed to pay the president of a bank an exorbitant sum in consideration for his services in procuring a loan. The court refused to enforce this agreement as unconscionable. Similarly, in *Niedermeyer* v. *Curators of State University*, 61 Mo. App. 654, a student paid tuition fees which he regarded as excessive, and which he did not believe he was required to pay under his contract with the university, only because he feared expulsion for non-payment. This payment was held to have been made under duress and hence recoverable. Cf. *Baldwin* v. *Sullivan Timber Co.*, 20 N. Y. Supp. 496; *Kelley* v. *Caplice*, 23 Kans. 474.

Strikingly analogous to the case at bar are the decisions that a salvor who takes advantage of the helplessness of the ship in distress to drive an unconscionable bargain will not be aided by the courts in his attempts to enforce the bargain. *Post* v. *Jones*, 19 How. 150, 160; *The Tornado*, 109 U. S. 110, 117; *The Elfrida*, 172 U. S. 186, 193-94. In *Post* v. *Jones*, *supra*, it was said that the courts "will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit". These cases are not unlike the familiar example of the drowning man who agrees to pay an exorbitant sum to a rescuer who would otherwise permit

him to drown. No court would enforce a contract made under such circumstances.[2]

To deny the existence of duress in a Government contract by ironic reference to the feebleness of the United States as against the overpowering strength of a single private corporation is an indulgence of rhetoric in disregard of fact. The United States with all its might and majesty never makes a contract. To speak of a contract by the United States is to employ an abstraction. We must not allow it to become a blinding abstraction. Contracts are made not by 130 million Americans but by some official on their behalf. Because the national interest is represented not by the power of the nation but by an individual professing to exercise authority of vast consequence to the nation, action by Government officials is often not binding against the Government in situations where private parties would be bound.[3] The contracts here were not made by an abstraction known as the United States or by the millions of its citizens. For all practical purposes, the arrangement was entered into by two persons, Bowles and Radford. And it was entered into by them against their better judgment because they had only Hobson's choice—which is no choice. They had no choice in view of the circumstances which subordinated them and by which they were governed, namely, that ships were needed, and needed quickly, and Bethlehem was needed to construct them quickly. The legal alternative—that the Government take over Bethlehem—was not an actual alternative, and Bethlehem knew this as well as the representatives of the Government.

The suggestion is made that Bethlehem's profits under these contracts were not exceptional when compared with the profits made under similar contracts, and that the enormous profits claimed by Bethlehem under these contracts cannot be regarded as

[2] The books are full of cases in which courts have refused to lend themselves as collecting agencies of contracts made under circumstances offensive to the conscience. See, for example, in addition to the cases cited in the text, Johnson v. Ford, 1[illegible] Tenn. 63; Harris v. Cary, 112 Va. 362; Northwestern Mut. Life Ins. Co. v. Barker, 241 Ky. 490, 497; Calvano v. Brill, 171 Misc. 298.

[3] E.g., the right to recover money paid under mistake of law, Wisconsin Central Railroad v. United States, 164 U. S. 190, 212, and the unavailability against the Government of the defenses of laches or neglect of duty, United States v. Kirkpatrick, 9 Wheat. 720, 735, and estoppel based on unauthorized acts of its agents, Lee v. Munroe, 7 Cranch 366; Utah Power & Light Co. v. United States, 243 U. S. 389, 408-09.

supporting the inference that Bethlehem took advantage of the Government's distress. But the only contracts before us are those involved in this litigation. There is nothing in this record which enables us to say that although these contracts are unconscionable, all contracts made by the Government during the same period were no less unconscionable. And even if this were so, it would be no argument that this Court should give its sanction to these contracts by making itself the instrument for realizing the unconscionable profits. What little light the record does cast upon contemporary contracts gives no justification for regarding these contracts as typical. The policy of Charles M. Schwab, Director General of the Fleet Corporation, was to make contracts providing for a maximum profit of 10%, out of which all federal taxes would have to be paid. See Letter of Oct. 2, 1918, to Edward N. Hurley, Chairman of the Shipping Board, relating to contracts with the American Shipbuilding Company.

If we are to go outside the record, the evidence is confusing and unreliable. It must be borne in mind that Bethlehem took no risk of loss, that under the contracts it was protected from the risks of rising costs of labor, materials, transportation, etc., that under the contracts it was not required to make any capital expenditures, that the Government agreed to advance all sums that should be necessary for the performance of the contracts. It is idle to compare the profits made by Bethlehem under these contracts with profits made by industrial concerns of various types under different types of contracts. Such figures are statistical quicksand unless we are told also that in each case the contractor was not required to make any capital investment, that he was insured against normal business risks, and that he was guaranteed a profit, regardless of any change in circumstances.

We know that the policy of the Navy Department with respect to so-called straight cost-plus shipbuilding contracts was to allow profits of 10% of actual cost. See Annual Report of the Secretary of the Navy (1917) p. 33; Annual Report (1918) p. 685; Annual Report (1919) pp. 572-76; Annual Report (1920) pp. 147-48. We know that, similarly, the policy of the War Department with respect to cost-plus contracts for the construction of cantonments was to allow profits not exceeding 10% of cost. See Annual Report of the Secretary of War (1917) vol. 1, p. 28; Annual Report (1918) vol. 1, p. 1319; Annual Report (1919) pp. 4158-42. See also Crowell,

Government War Contracts, p. 85 (in "emergency building contracts" a sliding scale of profits was employed, ranging from cost plus 7% on contracts less than $100,000 to cost plus 2½% on contracts more than $10,000,000). Similarly, contracts for the construction of buildings to house war workers were let on the basis of cost plus 2½% on contracts over $1,000,000, and 3½% on contracts under $1,000,000. See testimony of Otto M. Eidlitz, President of the U. S. Housing Corporation, Hearings before the subcommittee of the Senate Committee on Public Buildings and Grounds pursuant to S. Res. 371, 65th Cong., 3d Sess., p. 35.

These statistics obviously do not tell the whole story of Government contracts in the last war. But they indicate plainly enough that this Court should not accept, as a basis for decision in this case, the premise that Bethlehem's profits were conventional when compared with profits made in comparable transactions.

It is said, further, that even if these contracts are unenforceable when measured by standards of justice and equity enforced by the courts for centuries, nevertheless this Court must enforce the contracts now before us because Congress and the President specifically authorized such a traffic in profits. The suggestion is not consistent with historical fact.

The legislative history of the Emergency Shipping Fund Act furnishes no support for the contention that in conferring upon the President authority to enter into contracts for the construction of ships, Congress thereby commanded the courts to enforce all contracts that were made, without regard to their provisions and the circumstances under which they were negotiated. On the contrary, the debates contain many indications that Congress expected that the shipbuilders of the nation would provide their services for a reasonable compensation, and that the power conferred upon the President to take over shipyards would not be exercised. See remarks of Senator Knox, 55 Cong. Rec. 2518; Senator Calder, 55 *id.* 2529; Rep. Fitzgerald, 55 *id.* 3018. Indeed, the Act itself specified that ships should be built "at such reasonable price as shall be determined by the President". 40 Stat. 182, 183.

The National Defense Act, 39 Stat. 166, 213, specifically provided that "The compensation to be paid to any individual, firm, . . . for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just." There can be no clearer indication that Congress did

not authorize or approve any policy of trafficking in profits. The fact that Congress took care to ascertain whether the war agencies were letting contracts under which excessive profits were being made, see Hearings before subcommittee of the House Committee on Appropriations on H. R. 3971, 65th Cong., 1st Sess., especially pp. 15-17, shows very plainly that Congress in no way countenanced exploitation for exorbitant private profit of the necessities of the Government.

Authority given to make contracts does not imply authority to make unconscionable contracts. Suppose that Congress in authorizing the contracts in question had written into its legislation: "*Provided*, that no agency of government shall be authorized to enter into unconscionable contracts." Can it be that because Congress did not expressly provide that "unconscionable contracts" are unauthorized it impliedly sanctioned the making of "unconscionable contracts"? Or suppose the estimated costs in the contracts were so inflated by Bethlehem that its profits were 200% rather than 22%. Would this Court still be bound to enforce these contracts on the ground that Congress had commanded their enforcement? Surely Congress did not impliedly repeal historic legal principles and prohibit this Court from exercising its duty to withhold relief when the particular circumstances disclose an unconscionable arrangement in the making of which the Government's contracting officers had no practical choice.

The suggestion that President Wilson authorized a "traffic in profit" is refuted, if explicit proof be needed, by his utterances. For example, addressing a meeting of mine operators and manufacturers on July 12, 1917, he spoke as follows:

"I hear it insisted that more than a just price, more than a price that will sustain our industries, must be paid; that it is necessary to pay very liberal and unusual profits in order to "stimulate production"; that nothing but pecuniary rewards will do it—rewards paid in money, not in the mere liberation of the world.

"I take it for granted that those who argue thus do not stop to think what that means. Do they mean that you must be paid, must be bribed, to make your contribution, a contribution that costs you neither a drop of blood nor a tear, when the whole world is in travail and men everywhere depend upon and call to you to bring them out of bondage and make the world a fit place to live in again, amidst peace and justice?

"Do they mean that you will exact a price, drive a bargain, with the men who are enduring the agony of this war on the battlefield, in the trenches, amidst the lurking dangers of the sea, or with

the bereaved women and the pitiful children, before you will come forward to do your duty and give some part of your life, in easy, peaceful fashion, for the things we are fighting for, the things we have pledged our fortunes, our lives, our sacred honor to vindicate and defend—liberty and justice and fair dealing and the peace of nations? Of course you will not.

"It is inconceivable. Your patriotism is of the same self-denying stuff as the patriotism of the men dead or maimed on the fields of France, or else it is no patriotism at all.

"Let us never speak, then, of profits and of patriotism in the same sentence, but face facts and meet them.

"Let us do sound business, but not in the midst of a mist. Many a grievous burden of taxation will be laid on this Nation, in this generation and in the next, to pay for this war. Let us see to it that for every dollar that is taken from the people's pockets it shall be possible to obtain a dollar's worth of the sound stuffs they need." Public Papers of Woodrow Wilson, Vol. 3, pp. 75-6; 55 Cong. Rec. 4995.

Mr. Justice Holmes has said that "Men must turn square corners when they deal with the Government." *Rock Island &c. R. R.* v. *United States*, 254 U. S. 141, 143. His admonition has particular relevance when this Court is called upon to enforce agreements made with the Government at war for the production of supplies essential to the prosecution of the war. During wartime the bargaining position of Government contracting officers is inherently weak, no matter how conscientious they may be. If they are to deal on equal terms with private contractors, particularly where the subject matter of contracts is so intricate and so specialized as the building of ships, they must have available to them not only detailed information but also the time within which to study the data and the freedom to exercise a real choice. In the last war, at least, this was not generally true. See Sen. Rep. No. 944, 74th Cong., 1st Sess., pt. 4, p. 30. It is not difficult in these days to appreciate the position of negotiators for the Government in time of war and to realize how much the pressures of war deprive them of equality of bargaining power in situations where bargaining with private contractors is the only practicable means of securing necessary war supplies. Because the Government is in such a dependent position, and because those who deal with it on a cost-plus arrangement or some similar basis are assured of a profit, it is wholly consistent with practicalities and makes no unduly idealistic demand for the law to judge the arrangements of such wartime contractors by standards not unlike those by which a fi-

duciary's conduct is judged. Those upon whom the nation is dependent for its supplies in the defense of its life would hardly wish to be judged by lower standards.

The modes are vast and varied by which the nation obtains its war supplies. What will best supply war needs in amplest measure in the quickest time and least wastefully—whether by private letting and, if so, under what restrictions and safeguards; under what circumstances the Government should do its own supplying either by taking over old plants or building new ones or a combination of the two; to what extent and through what means peacetime habits and traditions may be displaced and disregarded—these are questions of policy for the wisdom and responsibility of the Congress and the Executive. The very limited scope of inquiry to which a litigation on a particular transaction is confined is hardly the basis for judgment on such far-flung issues. If the history of this Court permits one generalization above all others, it is the unwisdom of entering the domain of policy outside the very narrow legal limits presented by the record of a particular litigation. Such intrusion into the executive and legislative domains is not conducive to the just disposition of the immediate controversy. We are much less likely to go wrong if we do not depart from the well-grooved path of judicial competence.

This Court should not permit Bethlehem to recover these unconscionable profits, and thereby "make the court the instrument of this injustice." *Thomas* v. *Brownville, &c. R. R. Co.*, 109 U. S. 522, 526.

Mr. Justice DOUGLAS.

On the point of duress and coercion I thoroughly agree with the views expressed by Mr. Justice BLACK and join in the opinion of the Court. For the reasons stated by Mr. Justice BLACK, the claim that Bethlehem's profits were unconscionable in the legal sense would likewise fail.

There is, however, one aspect of the case on which I take a somewhat different view.

The United States does not contest here the right of Bethlehem to retain its "fixed fee" of approximately $12,000,000 for the construction of the ships. The dispute revolves around an additional sum of $12,000,000 which Bethlehem claims under the so-called

"bonus-for-savings" provision of the contracts. That provision in the several contracts was the same except for the amount of the fixed fee. Thus a typical contract provided: "Should the actual cost be less than the estimated . . . cost . . . the Contractor shall be allowed as profit on each vessel in addition to said fixed sum for profit of . . . . $210,000 one-half the amount by which such actual cost of each vessel falls short of the estimated cost . . . ."

I agree that the consummation of the bargain depended upon the inclusion of this "savings" clause and that in each instance there was but one contract, not several. My view, however, is that each contract was divisible or severable. " . . . . the essential feature of such a contract is that a portion of the price is by the terms of the agreement set off against a portion of the performance and made payable for that portion, so that when an apportioned part of the performance has been rendered a debt for that part immediately arises." Williston on Contracts, § 861 (Rev. Ed.). In other words, the whole performance of each contract was divided "into two sets of partial performances, each part of each set being the agreed exchange for a corresponding part of the set of performances to be rendered by the other promisor". *Id.*, § 860A. (1) The promise of the Fleet Corporation to pay the actual cost plus the fixed fee was exchanged for Bethlehem's undertaking to construct the ships. (2) The promise of the Fleet Corporation to pay one-half the amount by which the actual cost fell short of the estimated cost was exchanged for Bethlehem's promise (which is implied) to effect the savings by increasing efficiency.

Although I am clear that the contracts would not have been made but for the inclusion of the "savings" provision, I do not believe that there is a "necessary dependency" between these two sets of promises within the rule of *Philadelphia, W. & B. R. Co.* v. *Howard*, 13 How. 307, 339. And see *Pollak* v. *Brush Electric Assoc.*, 128 U. S. 446, 455; *Fullmer* v. *Poust*, 155 Pa. 275, 278; Restatement, Contracts, § 266(3). Precedents, to be sure, are of little aid since each case turns on its special circumstances. But the construction of divisibility seems warranted by the facts, though here as in other cases considerable reliance must be placed on implications.

Bethlehem's argument against divisibility rests on such testimony of Piez, who represented the Fleet Corporation, as follows:

"The price had to be placed for actual cost, if we knew the cost, plus an allowance for contingencies, plus an allowance for incentive, plus the fee. So we start out with the bare cost; then in order to meet any contingencies that may happen, add some allowance for contingencies; in order to give a proper incentive, add an incentive allowance; and then add the fee." That is to say the "savings" clause was deemed to be valuable from the Fleet Corporation's viewpoint as an "incentive" to keep the costs down and to expedite the work. And Powell, the author of the "savings" clause in this case and the representative of Bethlehem, testified that the savings to be obtained would be sufficient to "wipe out the excess profits taxes", so that the fixed fee would be "net" to Bethlehem.

But Powell's testimony also indicated that while the "savings" clause was an "incentive", Bethlehem was to earn the "savings":

"Q. Then I take it that one of your great problems, as the driving force of this organization, was to improve your labor conditions, or first to prevent labor conditions from getting worse and then to try to improve them?

"A. Yes.

"Q. Over what they were in December of 1917?

"A. Yes.

"Q. And if you were able to do that, then there was a possibility of some profit in these contracts under the half savings clause?

"A. Yes.

"Q. Was there any likelihood, or did you at that time foresee any likelihood, of any substantial saving in your material items?

"A. No, I should not have expected at that time to make any saving of any amount in the materials.

"Q. So that, if Bethlehem was to make any money out of these contracts in excess of the fixed fee, it was your judgment that the only way to do it was by increasing the efficiency of the yards?

"A. Exactly."

Powell also testified:

"The estimate was a figure which we had to shoot at that in my judgment gave us a reasonable profit or a chance of making a substantial saving. To make that saving, we had to operate more efficiently than what we might say was average efficiency under conditions that then existed. If we were going to make that saving, we had to overcome any increased cost due to decreased efficiency, and increase efficiency beyond what it was at that time."

And Piez testified that the provision was to give the ship-

builders an "incentive" to "use their ingenuity to make a larger profit."

The Special Master found that the estimates designated as "base prices" in the contracts "would afford Bethlehem a reasonable opportunity to effect 'savings' as a result of its efforts and ability to increase efficiency of management and labor as compared with average efficiency then existing." He also found that "it was understood that participation in 'savings' was supposed to represent a bonus or additional compensation to be earned by Bethlehem as consideration for its special efforts and ability to reduce cost by increasing efficiency of management and labor as compared with efficiency then existing." Yet he further found that "Bethlehem was to participate in savings however earned, but expected to produce savings by increased efficiency."

My difficulty is with that last finding. If Bethlehem was to share half of the savings "however earned", then its right to receive the bonus might well depend on a wholly fortuitous circumstance or it might accrue as petitioner suggests "simply as a reward for the inaccuracy of its estimate of actual costs." Under that view Bethlehem would be entitled to $12,000,000 additional compensation merely because the wholesale price index fell. Yet that would be tantamount to a gift by public officers of property of the United States. The same result would follow if the clause be read as containing merely a "best efforts" provision. The contract already provided that Bethlehem "in all its acts hereunder, shall use its best efforts to protect and subserve the interest of the Owner." Even in the absence of such a provision, one would be implied. *United States* v. *A. Bentley & Sons Co.*, 293 Fed. 229, 235; *United States* v. *George A. Fuller Co.*, 296 Fed. 178, 180. Hence it is difficult for me to imply that this additional $12,000,000 was offered as a reward for performing an obligation which the law would impose on the contractor in any event. *Burke & James, Inc.* v. *United States*, 63 C. Cls. 36, 57. That, too, would be a grant of public funds for which the United States would receive no *quid pro quo*.

Hence it seems more reasonable to imply that Bethlehem was to render an additional performance for the additional compensation of $12,000,000. Such a construction of the contracts avoids the difficulties I have mentioned, as it gives the United States a *quid pro quo* for its promise to pay an additional $12,000,000. Cf. *Dayton Airplane Co.* v. *United States*, 21 F. 2d 673, 682-683.

And it is supported by the testimony of the representatives of the two contracting parties who negotiated the contracts.

In that view of the matter Bethlehem would be put to its proof that it effected the savings which it now claims. Mere guesswork would not be enough. *J. J. Preis & Co.* v. *United States*, 58 C. Cls. 81, 86. Precise proof of each dollar saved might not be possible. But a reasonable approximation of Bethlehem's contribution to the savings would be necessary. Such burden of proof has been sustained in other cases involving similar contracts. *Cohen, Endel & Co.* v. *United States*, 60 C. Cls. 513; *F. Jacobson & Sons* v. *United States*, 61 C. Cls. 420. The Circuit Court of Appeals stated that there was "some evidence tending to show that savings resulted, in part at least, from increased efficiency." 113 F. 2d 301, 307. But there was no clear showing that special efforts were made to reduce costs and that the savings which resulted were traceable to such efforts. The necessary findings on that issue were not made.